A

GUIDE TO JURIES:

Setting forth their

Antiquity, Power and *Duty,*

From the

Common-Law and *Statutes.*

With a TABLE.

By a Person of Quality.

ALSO

A *LETTER*, to the Author, upon the same

SUBJECT.

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1. Sept: 1724

Anl Hammond

Tentanda Via
est.

To all Honeſt

JURY-MEN.

Gentlemen,

IN a *Word*, You *are* England's Ephori, *and* Tribuni; *The Boundaries of* Prerogative *and* Priviledge, *and the living Bulwark of the* Laws. *Your* Honour *is Eclipſed, is unaccountably* * *ſhrunk: The* Office *yet is great: Here's demonſtrated the great Priviledge you be, that it may be ſeen how much all* Engliſh-men *ought, in Intereſt, to Value and Encourage you. Here's ſet forth* What *and* How *you may do, and* What *and* How *you may not Do, under*

* Learned Dr. *Cowel*, in word *Jury*, ſpeaks of *Furies* being (in his own words) *Aſſociates and Aſſiſtants to the Judges of the Court* (anciently) *in a kind of Equality; whereas, now adays* (ſaith he) *they attend them in great Humility*, &c. Citing alſo *Lamb.* and *Caſt. of Normandy* agreeing with them.

der what Penalties: Also the History of the Whole. The King is graciously pleased to Declare, He will Govern by Law; *Is't fit you should know how to Govern your selves according to Law. This is Concise, and a Breviate, rather than a Book, that, should it meet with a queasie Stomach, little Purse, or narrow Soul, the same might not stumble at it. If any thing by this means happen so general, as admit of any Exception, you may expect it in some other, if not in the same place. It's chiefly about Criminal Causes, where the King's Name's used for that of the Plaintiff, because, most Difficult and Greatest Concern; But is serviceable and sufficient for others too. It may, at least, serve to Stir up, and to Foil, if not Assist learneder Hands.* Adieu.

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A Guide

A GUIDE TO JURIES.

OF what Date Juries be, is the same to say, as when was *England* first Inhabited, altogether uncertain. But that their Antiquity here in *England* runs to and beyond the *Norman* Conquest, among the *Danes*, the *Saxons*, and the *Britains*, is most certain. *Olaus Magnus*, *Olaus Wormius*, *Verstegan*, *Fortesc. Co. Lit.* &c.

The *Saxons* conquering the *Britains*, mixed their Customs with the *Brittish*, so the *Danes* those *Brittish* and *Saxon*

ones with theirs, and the *Normans* all these with theirs; every Conquerour making some alteration. Yet this Law was, and from time to time hath been preserved and continued an Inheritance indisputable and Sacred unto us through all Revolutions, without any Interruption.

None but must acknowledge this of all others, the best and most effectual way to find out Truth. There is no other Way or Art in the whole World, says *Fortescue*, so remote from all Danger of Subornation and Corruption, 75.

Aaron had, it's true, in plain Letters of Gold, *Urim* and *Thummim* wrote on his Breast, signifying what he either had, or ought have had, *lucem in monte, ac in voluntate rectitudinem*, Ability in Parts, and Integrity in Practice. But have always all other Judges since had such Parts and Practises? Their Interests, Ambition, Pleasures, other Passions and Frailties influenced them too much, rather sufficient enough to render them, as the Prophet *Isaiah*, c. 33. v. 15. says, *Idols with Eyes, Ears and Mouths*, viz.

Such

Such as would neither hear the Peoples Complaints, regard the Oppreſſed, nor pronounce a juſt Judgment. Judges have Places and Preferments ſo extraordinary Honourable and Profitable: And what's their Tenure? Even during Pleaſure, a term for ſo long as they do nothing but what and as pleaſes, *&c.* and do every thing which and as does pleaſe, *&c.* And whoſe Pleaſure muſt it be? Truly every ones too, that any how has or can make any Intereſt, *&c.* Thus a ſhort Syllogiſm proclaims them little other than Bond-ſlaves to ſuch Mens pleaſures, and menaces the People with the worſt of all Miſeries, Law-oppreſſion, Oppreſſion under colour of Law; unleſs it be conceivable Mens pleaſures were to have the Judges give Sentence againſt them. Judges alſo were all Lawyers we know, uſed juſt before to take Fees, it's the more therefore all forget it now. Judges are concerned in ſo many Cauſes, they are ſubject to be tempted the oftner, and every Temptation is the greater, becauſe they know, if would yield, their gain might be ſo often. Judges are ſo

few, it's plain they may the easier be Corrupted. Judges cann't want Courage, they think themselves lyable to no Action, *&c.* in any case, do what they will, but are absolutely dispunishable, *Co.* 12. 24, 25. *Hutton.* Whereas a Jury on the other side, if it err, in many cases it's lyable to an Attaint, the greatest Punishment they know on this side Death. A Jury consists of many Persons. Those which be Jury-men in one Case, yet may be in few more. They be Men of other Professions, used never in any Case to take Fees, *&c.* They are not prejudiced with fear of losing their Offices, *&c.*

And to further manifest the difference of Tryal by Judges, and of this by Juries, Jury-men all are, and must be *Liberi & legales homines: Liberi* free of, and from all manner of Bondage, Obligations, Affections, Relations, Passions, Interests, and other Prejudices whatsoever, (as indeed it's ill Fishing in muddy or troubled Waters:) *Legales*, ones Peers or Equals, *Mag. Ch. c.* 29. *West.* 1. *c.* 6. Of full 21 Years old, not Outlawed, never Attainted or Convicted of

Trea-

Treaſon, Felony, Falſe-Verdict, Perjury, any Conſpiracy at King's-Suit, nor ever Adjudged to the Pillory, Tumbrel. *&c.* whereby rendered Infamous; nor any Alien (unleſs an Alien be Tryed, *&c.*) But ſuch others as be moſt nigh, moſt ſufficient, and leaſt ſuſpicious, 28 *E.* 1. *c.* 9. *F. N. B.* 165. *Dy.* 59. 34 *E.* 3. *c.* 4. *Regiſt.* 177. 8 *E.* 3. 30. They were Anciently all Knights, *Glanvil. l.* 2. *c.* 14, 15. *Bract.* 116. They are, and muſt be yet Perſons of Honour and Repute, 1 *R.* 3. *c.* 4 *Brit.* 39. *Mir.* 117, 118. 11 *H.* 7. 41. *Young* 116. 11 *H.* 4. 35. *Stanf.* 88. And *Si l'Enditement ne y ert een fait de croyable gens & de bone fame, n'eſt nul tenus à cette reſpondrue.* If an Indictment be found, but not by Credible People, and thoſe of good Repute, no Body's bound to take notice of it, *Mir.* 200. They muſt be ſuch Perſons as are named and returned at the Election of the Sheriff or Coroner. They muſt be every one Sworn every ſeveral Tryal, and that in and by a particular Oath. If any of the Grand Jury be as aforeſaid, any wiſe amiſs, what they do is

quaſhed and made void on bare motion to the Court. If any of the Petty-Jury happen ſo, the Party by Challenging of them, as appear to be Sworn, either ſets aſide the *Pannel*, *viz.* all of them, or may any of them, by taking Exception to the Poll, *viz.* to them ſeverally, as the Caſe falls out; and peremptorily, without ſhewing any Cauſe, may Challenge and ſet aſide as many as will, under 36, in caſe of High-Treaſon or Miſpriſion of High-Treaſon; or under 21, in caſe of any Felony. And ſhewing any ſuch Cauſe as aforeſaid, as many as will, in any Caſe whatſoever, *Co. L.* 156. Now they are ſuch Elect and Choice Men, becauſe of the great Truſt repoſed in them: And muſt be Equals, that the Defendant may the better ſpeak to, and expoſtulate with, or reflect upon them, if do amiſs. And that they may not be over awed, *&c.* by's being greater than them; (whereas *Magna ſtupent, ſuperiora perſtringunt.* Greater things confound and aſtoniſh us, and things above us dazle our Eyes.) Nor be careleſs or perfunctory for his being much leſs

than

than them, (*Inferiora ut exigua & minima contemnimus.* We are apt to slight things beneath us, as small and contemptible, or inconsiderable.) And must be of the Neighbourhood, that coming from nigh where the Question arises, the Defendant, in all probability, may have the better knowledge of them, to except against, or to approve of them; and such may also the more likely know somewhat themselves of the Party, of the Matter, of the Credit of the Witnesses, and all Circumstances. *Lex intendit vicinus vicini facta sciat. Co. L.* 78. Thus if the Place happen disputable, whence the Jury shall come, they shall come from whence the matter is like best to be known, 21 *E.* 4. 8. Besides, in this way of or by Jury, where Life or Member is concerned, or in any danger, and in all other Criminal Causes, is required two Tryals of the Party before he can be said Guilty, or any Judgment can be given against him: And the Party must also be found to be Guilty on both these Tryals, else all is nothing. The Grand Jury must first Examine the matter, and

the Petty-Jury after Examine all again, to prevent and ſecure againſt all Surprizes of the Party, and Miſtakes or Errors in the Jury. It ſeems as if very Anciently the number on a Jury was indefinite, but it was all the Perſons preſent, come as would come, *Brit. N. Bacon, &c.* Like as of Old it was here of thoſe we now call the Houſe of Commons: *Coneil. Brit.* 350. *Ingulph.* &c. And in the Tryals at *Rome*, where *Vox Populi* was the Verdict, (except in Caſe of a Senator, which indeed was Tryed by his Peers, other Senators.) Hence probably it was, that all Courts were at firſt to be open, and ſo acceſſible. Likewiſe *Deut.* 19. and ſome other Texts of the Old Teſtament, ſeems as if the Tryal amongſt the *Jews* were ſo: But in Analogy of late it's reduced to the number of twelve, like as the Prophets were twelve, to foretell the Truth, the Apoſtles twelve to preach the Truth; the Diſcoverers twelve, ſent into *Canaan* to ſeek and report the Truth; and the Stones twelve, that the Heavenly *Hieruſalem* is Built on: And as the Judges were twelve anciently to

Try

Try and Determine matters of Law; and always when there is any wageing Law, there must be twelve to Swear in it; and also as for matters of State, there were formerly 12 Councellors of State. And any thing now which any Jury can be said to do, must have the joint consent of twelve, *West.* 2. *c.* 13. Else it's in construction of Law, not the doing of the Jury, but of Private Persons, and void. *Mir.* 42. 208. 41. *Ass.* 11. 6 *H.* 4. 2. 21 *E.* 3. 31. 29 *E.* 3. 43. *Finch.* 58. The Grand Jury consists of more Persons commonly than twelve, but as aforesaid twelve agreeing, it's enough, and so many of them must. So that by the Law of Juries 24 Men in all, first and last, find one Guilty, *&c.* before the Judgement can be given, or one can be punished for the Fault one's accused of. And besides, every Man of the latter Jury, even all the whole twelve, must all and every of them agree, and be of that one and only Mind; (much to suspect, unless one be certainly and plainly Guilty. It's more for all twelve, than for twenty nine out

of thirty to agree.) Any of the Grand Jury giving in a Presentment or Indictment, without eleven more of the same Mind, and agreeing with him, ought to be Imprisoned, 40. *Ass.* 10. which also for any one of the Petty-Jury to do, none will deny but to be worse. A Judge was Hanged for giving Judgment on the Verdict of eleven Jury-men, *Mir.* 296. But on the other side, the Judges are not so many at a Tryal scarce ever, the major part of them agreeing, it's enough; their Tryal would be but one, or once only; they are never sworn at the Tryal, nor ever at all, but only once, and that exceeding generally; they cannot any of them be excepted against, or Challenged, (though Anciently might, *Lamb. Mir. Bract. Flota*) be they never so great strangers, professed Enemies, and otherwise ill qualified; and though the King be Party, yet chooses them himself against one.

Besides, if Judges had Power of both determining the matter of Fact, and also the matter of Law, as must, if were no Juries, their Latitude of Erring, *&c.*

must

must then be the greater, and their doing wrong or mischief might be the more, in as much as might wrong one then in both the Fact and Law; and their Encouragement so to do, would be Improved, since then it must be harder to detect them, as whether erred in the Fact, or in the Law, or partly in both; like as it's easier seeking a Bush than a Wood: And as it's said, *Occasio facit furem:* Opportunity makes many a Whore. But were Judges presumed Saints, and never so upright, *&c.* yet who can imagine but at a Tryal, when Witnesses are all Examined, and Evidence all given, the Jury being so many Persons, and probably knowing something of the matter before, they may all assisting one another better observe, remember, and judge upon the whole matter, than any one or two, *&c.* others, though called Judges? Certainly one may do more with help than without. So the Proverb it, *Ne Hercules quidem contrà duos; oculi plus oculo vident:* Two to one is odds at Foot-Ball: And, *Non omnes sed pauci decipi aut decipere possunt*, The fewer may the more

more easily deceive, or be deceived *Quandoque bonus dormitat Homerus. Nemo sine Crimine vivit. Humanum est errare.* It's natural for Man to err. None's without fault, and the surest Foot may slip.

Visc. St. *Albans*, *Aph.* 8. says, That's the best Law, which leaves the least to the Arbitrariness of a Judge; and *Bract.* 119. says, Judges represent the King's Person, they are his Officers, and Act in his stead, (and hence concludes) they ought not at all be concerned in Causes of Life or Member, *&c.* (Where the King's Party) for, says he, the King is thus Judge as it were in his own Cause.

Thus appears what is the Difference of Judges and Juries, and something of the Reason why the Parliament has all along been so Zealous for Tryals by Juries, as no fewer than 58 several times since the *Norman* Conquest, hath established and confirmed the Tryal by Juries; no one Priviledge else nigh so often remembred in Parliament.

Now, for the Power and Authority of *Juries*, and how the Wisdom of the Law hath

hath entruſted and enabled them in this Tryal. The Law ſays, in Tryals, whether any Complaints as made, or any matter as alledged be true or not, the Judges ought not, nor can ſay, nor have any thing at all to do therewith, but the Jury only. *Ad queſtionem facti non reſpondent Judices.* All the whole, or moſt they can do, or at leaſt ought, is only after and upon what the Jury, or the Parties themſelves agree firſt to be true. What the Jury does, is called *Verdictum, Veridictum*, the declaring of what is the Truth in the Matter. What the Judges do, is called *Judicium, Juris dictum*, the telling only of what is the Law. Thus it is, that every finding of the Jury as their Verdict, *&c.* muſt be poſitive, what the Fact and Party's intent, *&c.* was, and not ſaying only what their Evidence is, that it was; for the Judges can't even ſo far meddle with, or take Conuſance of the matter of Fact, as but to ſay, then the Fact, Caſe, *&c.* is ſo and ſo, if you agree, your Evidence to be ſo and ſo, and accordingly give Judgment. *Co.* 9. *Downham's c. Co.* 10. *Oxford c. Ben-*

lew

low. 3 *E.* 6. *Iſaac & Clerke c. Hob.* 167. As *A.* delivers *B.* Goods, and after demands them again of *B.* but he refuſes to deliver them again; if *A.* ſues *B.* for finding theſe Goods, and converting them to his own Uſe, the Judges will tell the Jury, ſince *B.* refuſes to re-deliver them, this is Evidence enough to find him Guilty of converting them to his own Uſe, *&c.* and is in Law a Converſion. But if the Jury gave their Verdict, *&c.* ſpecially, as that *A.* delivered *B.* the Goods, and after re-demanded them, but *B.* refuſed the delivering of them back, without ſaying poſitively *B.* converted them to his own Uſe, or not ſaying generally, we find for the Plaintiff, which is *tantamount*, the Judges cann't ſay and judge *B.* Guilty, *&c.* but muſt diſcharge him. So where in a Tryal, fraud is pretended by one Party done, *&c.* by the other, the Judges will tell the Jury, ſuch and ſuch parts of the Evidence prove the Fraud, or in conſtruction of Law are Fraud. But if the Jury give their Verdict ſpecially, that ſuch and ſuch things are true, (which the Judges ſaid prove the Fraud) and not

not saying positively there was Fraud, the Judges cannot say or judge Fraud, nor take the least notice of any thing as such. In the case of *Roger Mortimer* in Parliament, *Ao.* 1 *E.* 3. it was adjudged there, 28 *E.* 3. *n.* 10. that the matters he was accused of, though were notorious, and known to them all in Parliament, and all People else, yet they could not give Judgment upon this, nor any time ought proceed on any knowledge of their own. One Condemned of Trespass in the Common-Pleas, the Judges seeing him in Court, and knowing him never so well, yet it was adjudged, if he deny himself to be the same Person, they cann't say he is, and so cause him apprehended; because they cann't judge of any thing, nor take notice, but only of what is upon Record before them, 33 *H.* 6. 55. Thus if *A.* be Indicted of stealing five shillings, the Jury may give a Verdict, that he is Guilty of stealing the five shillings, but only to the value of ten pence; and

In *Henry* the Third's time, 1 *s.* was as much as 40 now, and before then, more; yet the Law was then, one must steal above the value of 1 *s.* to be Guilty of Felony: So that

that Merciful Juries now value by the Ancient ſhilling, and ſave many, not Guilty of above the value of 40 *s.* preſent Money.

and the Judges here cannot ſay, the five ſhillings were more worth or leſs, though never ſo apparent. King *Henry* the fourth asking Judge *Gaſcoyn*, what if he ſaw *A.* kill *B.* and the Jury will find not that *A.* killed *B.* but that *C.* did? He anſwered, I can only Reprieve *C*, and then intercede with your Majeſty for his Pardon. *Pl.* 83. The Infamous *Empſon* and *Dudley*, proceeding to judge as Judges, of matters upon Information by Witneſſes, *&c.* otherwiſe than by Juries; this was one indelible blot in their Eſcutcheon, though had an Act of Parliament, 11 *H.* 7. *c.* 3. to warrant them in ſo doing: *Ander. l.* 1. 156. When a Priſoner is Arraigned, he ſays, he puts himſelf on God and his Countrey (neither of which are the Judges) for his Tryal; which Countrey is the Jury. So it is manifeſt, Juries have the ſole Power and Conuſance of the matters of Fact, as whether a thing be true or not, *&c.* and the Judges have at moſt

moſt only to do with matters of Law.

Jury men have alſo the determination of Law, but with this difference from that of Fact, that it's neceſſary they determine the matter of Fact. But they may either refuſe to meddle with any thing of Law, and leave it to the Judges, or at their Election, may take upon them knowledge of the Law, and determine both Fact and Law themſelves. *Lit.* §. 368. and ſo is every days Experience, whereof ſee more anon, ſpeaking of general Verdicts, and ſpecial Verdicts. Only if a Jury give a Verdict, ſetting forth ſpecially or particularly how the matter was, and then draw an ill Concluſion as to the matter of Law thereupon, the Judges will judge againſt, and ſo make the Judgment of the Jury in the matter of Law void, *Hob.* 53. As ſuppoſe *A.* be Indicted of Murdering *B.* the 10*th.* of *Feb. &c.* And the Jury give their Verdict, that *A.* gave the Wound at *C.* the 5*th.* of *Feb.* and that *B.* died at *D.* the 10*th.* of *Feb.* And conclude, that *A.* murdered *B.* at *C.* or on the 5*th.* of *Feb.* Now the Law ſaying the Murder was on, and at the place

and

and time, when and where the Party died, the Judges will judge againſt the Judgment of the Jury, *Co.* 4. 42. So *Anno* 1654. in *B. R.* between the Protector and *Sommer*, the Court ſaid, the Jury had concluded contrary to their premiſes, finding he killed two Men on the Road, but calling it Manſlaughter, *ſe defendendo*, and ſo the Judges ordered him to be Tryed again.

Thus we ſee, Judges are uneſſential and needleſs in a Tryal by Jury, further than to aſſiſt it, by anſwering and informing what the Law is, where difficulties ariſe, or at leaſt the Primitive Conſtitution might be thus. Like as alſo yet they be in the Houſe of Lords, or when any Tryal is by the Lords, but Aſſiſtants only, when conſulted, and no Parties of or at the Tryal, *&c.* Or as it is, and always has been in Courts Barons, Hundred Courts, Courts of Ancient Demeſne, and County Courts, 6 *E.* 4. 3. *Crompt.* 232, 233. and where the Sheriff is made Judge, though by the King's Writ, *&c. Co.* 6. 11, 12. The very form of ſpecial Verdicts to this day, looks as if it were ſo. As in Murder, the Jury find and give

give their Verdict (first) how, and in what manner particularly the Fact was committed, and then say, but whether upon the whole matter aforesaid, the killing aforesaid of *J. S.* be Murder, (in construction of Law) the Jury is ignorant, and therefore ask the Advice of the Court; and (further saying,) if upon the whole matter aforesaid, it seem to the Judges and Court, that it is Murder, then *the Jury* on their Oath, *say, the said J. N. is Guilty* in manner and form as by the Indictment against him is supposed. And if upon the whole matter, *&c.* it seem, *&c.* that it is not Murder, then, *&c. J. N.* is not Guilty in manner, *&c. Co.* 9. 64. So all the Judges do is but Advice, though in matter of Law; and it's the Jury only that judges one Guilty or not Guilty of Murder, *&c.* and whether it be Murder, or what one is Guilty of, by the Advice and Assistance only of the Judges, without their being any wise any Parties of or in giving such Judgment. And the Reason, and only Reason, why it ever seems otherwise, may rise hence, that the Judges of *Westminster-Hall*

Hall keep the ſaid inferiour Courts to their due Bounds, Methods, and Order. And the Lords keep the Judges to theirs, when amongſt them; but there's no Body does in *Weſtminſter-Hall*. The like is hinted by the *Stat.* of *Marlb. c.* 26. which ſays, *Murdrum*, &c. *non adjudicetur coram Juſtitiarijs*, Murder, *&c.* ſhall not be adjudged in the preſence of the Judges: Shewing the Judgment always to be in the preſence of, not by the Judges. The Ancient Books call Jury-men Judges, as *Mir.* 209. And it's not for nothing, the Law is ſo tender of them: He that ſtrikes one of them, it's perpetual Impriſonment, and forfeiture of the offending Hand, *Judg.* 174.

It perhaps may be pardonable in Councellors, becauſe for their Fees, and not pretending Authority: But why Judges, though apt to Indulge, Improve, and Extend their own Power and Juriſdiction, ſhould offer to brow-beat, threaten, order, impoſe upon, or wheedle, flatter, tempt, inſinuate with, or any wiſe lead, perſwade, direct, incline or diſpoſe Juries, how to find their Verdict, unleſs only directing them ſo far as Juries require

quire of them, it's hard to say. People daily Rob, and so have done, on *Salisbury-Plain*, but it's ne'er the more Lawful. Thus are Judges Trumpets, and Juries the Eccho, let who will blow. Thus are Juries but an empty Name: Thus is turned topsy-turvy all the whole thing of Juries. Thus might the Judges draw, and ingross to themselves the whole Power in the Tryal, and be in Effect Judges and Juries too. Thus is the Tryal by Juries a colour, a sham, and really no Tryal at all by Jury. Were this allowable by Law, we should never have had any; the having them would thus be only an unnecessary trouble, *&c.* whereas, *Lex nunquam per plura quod possit per pauciora*, The Law never sets up or requires any thing so vain or fruitless.

But some will say, the Jury can do nothing, but on the Evidence given in Court, which the Judges hear as well as the Jury, and so may see the Truth, and know how the Verdict ought to be, as well as the Jury, and consequently they may Instruct, Assist, *&c.* the Jury. It's true, they may be helpful, they may assist,

assist, but however, it's no matter for their being as aforesaid, too Officious. And besides, as aforesaid, that the Jury is Neighbours of the Fact, of the Party, of the Witnesses, *&c.* but the Judges strangers; and the Jury be more Persons, and the Judges fewer, *&c.* The Jury also is not bound up to the Evidence only given in Court, or that the Judges hear, but may go upon their own private knowledge. Suppose *A.* sues *B.* on a Bond for ten pounds, and *B.* pleads payment, but at Tryal proves nothing: The Judges themselves say to the Jury, you must find for *A.* unless know the Money paid your selves: Which shews, the Jury may find for *B.* if they know the Money paid, though the Judges knew nothing of it, 4 *H.* 7. 29. So *Hob.* So if one be Arraigned, and no Witness produced against him, the Court says the like; as was seen this *Michaelmas* Term, 81. in *B. R. Bradley*'s Case, and by daily practice. They use their own knowledge besides, and often against the the Evidence in Court, *Cr. El.* 616. *Groves* and *Short*'s Case. So in *Plowd.* 410,

410, 411. So a great Case adjudged in *B. R. Hill.* 21 C. 1. And another there, 22 C. 1. And so says *Stanf.* If a Jury know any thing of themselves, it's as much as by Evidence, 130. So *Plowden* says, a Petty-Jury is sometimes bound to give their Verdict, though have no Evidence, *f.* 12. Hence in all Cases at Common Law, one Witness is accepted of as sufficient; and doubtless any Verdict is good, though in such Cases, without any Evidence given in Court, because the Jury is presumed to know somewhat of themselves. Whereas in all other Countries in the World, where Juries be not used, and here when the Tryal is without a Jury, there must be at least two, as hereafter shall be said more at large. Thus in any Attaint brought against a Jury, more Evidence may be given on that side the Jury passed of or for, or in behalf of the Jury, than was given before, *Dy.* 53. b which could not be, if their own knowledge were not Evidence, as well as that given in Court. *Styles* says, 23 *C.* 1. in *B. R.* it was adjudged, that the Grand Jury are not bound to find an Indictment, though

though have Evidence, since they may know something of themselves to overbalance it. So is *Plowden*, A Jury may sometimes go against their Evidence given in Court, 8. b And one may read, Juries were Anciently punished for going though according to the Witnesses, if happened false ones, *Mir.* 48. The Evidence to a Grand Jury is seldom heard by the Judges, which yet could not be, if none were Evidence but what given in Court. Likewise, a Jury knowing of a Record, Statute, &c. may give their Verdict, &c. according to *it*, though never given in Evidence. *Moor* says, a Jury-man delivered his Companions a certain Paper concerning the Question out of Court, yet the Verdict was adjudged good, *Case* 656. Besides, if it happen they have no other Evidence but what the Judges know as well as they, yet they ought by, and according to the true purport and meaning of their Oaths, to proceed on it in their own sense, and as they apprehend or understand it themselves, and no otherwise, though the Judges differ with them;

else

else how can they discharge their Conscience? And it often falls out, they may differ. No two Lawyers, nay, Judges, reading or hearing the very same Case, but presently make different Inferences, Deductions, Collections, Conclusions and Arguments, yea, the same Person at different times; like as the Philosophers hold our Senses and Sentiments as different as Physiognomies. And why should *A.* impose his Opinion on *B.* rather than *B.* on *A?* So of Judges and Juries. One cann't see by another's Eyes. And this is certain, every thing any Jury does, as a Jury, is on Oath, and they swear to be true by Vertue of the Oath at first administred them; therefore if any of them happen to joyn in a Verdict, *&c.* with the rest, against *his* Opinion, or not throughly satisfied in their *own* private judgment, such a Verdict, *&c.* though never so true and good in it self, yet makes the Party or Parties, as aforesaid, not satisfied, certainly forsworn, at least *in foro Conscientiæ*, as to their Conscience: For Perjury is not only a Lye confirmed by Oath, but likewise either when any one being deceived, and be-

lieving that to be true which is not, rashly, or unadvisedly swears it to be true. Or either when any one thinking a thing not true, swears it is true, though indeed it be true, *Flet.* 394. *Bract.* 288, 289, 292. and all the Casuists. So is seen in *Palmer's* Reports. One was Indicted and Punished for swearing a thing so and so, because he did not know it to be true as he swore. So that upon the whole, one may see a Judge ought not to meddle at all with the Jury: If he differ not with them, it's needless and troublesome; if he differ, they are not to mind him; take it which way one will.

But perhaps it will be urged, that this must be understood only as to a matter of Fact, and that however, as to matter of Law, the Jury ought always to be advised and governed by the Judges, though not as to matter of Fact: No, no further than a masterly deference that is payable to the Judges, as more Learned in the Laws. For if the Judges lay, or any Witness swear the Law to be so and so, no Jury is by Law bound, or any wise obliged beyond their own Reason, &c. at least to believe them in it.

it, 9 *H.* 6. 38. *Finch* 58. If an Attaint be brought against a Jury, it's no Excuse, that the Verdict is according to the Judges Directions, *Cro. El.* 309. 18.

Now says a timerous Ignorant Juror, Oh! but whether the Law be thus or not, the Judges will Punish the Jury if comply not with them. This sure would be pretty! A Jury, perhaps, forsworn, and lyable to an Attaint, if do comply, and yet punishable if do not: No, no, the Law (which is nothing but improved and refined Reason) was never so unreasonable to suffer this. *A.* levyed a Fine of Lands to *B.* and *B.* paid *A.* the purchase-money: But after *A.* said, he was then at levying the Fine under Age of One and Twenty Years old, and therefore the Fine was void. The Law says here, the Judges shall determine by looking on the Party, whether he were of full Age or not, and the Jury shall not, (the true Reason being, that if the Party seem of full Age, though he be not, he shall not avoid the Fine, to prevent cheating, &c. Whereas, if the Jury were to try it, they must not go according to the

seeming, but real true Age, and so if he want but a Day of One and Twenty Years, he must thus be adjudged under Age, as much as if he wanted Twenty Years, and *B.* should be cheated.) This Fine was after reversed by King's Bench, because *A.* did appear, and was also proved by four Witnesses to be under Age: But the Validity of the Fine coming after to be disputed in Common Pleas, on a Tryal by Jury, though the Court here told the Jury, that notwithstanding some Witnesses prove to you *A.* was of full Age at levying the Fine, yet you ought not to heed them, for the Judges have the sole and only power of determining whether of full Age or not, and the Judges of the King's Bench have already determined it; nevertheless, the Jury being somewhat extraordinary, and not so very leadable Men, gave their Verdict contrary to the Direction of the Court, and as if *A.* were then of full Age: And an Attaint being after brought against the *Jury*, the *Jury* was acquitted and commended, *Dy.* 201. & 301. And the *Jury* is the more justifiable in it,

since

since the Judges first altered the Law, in trying by Witnesses, and not only by Inspection, as *Juries* also do, which in Tryals by Witnesses are, as aforesaid, the more competent, &c. Of this Nature is a memorable Case of *Bushel*, reported by Lord Chief Justice *Vaughan*, where *Meade* and *Penne*, two Quakers, were Indicted at the *Old Baily* for their Meetings; and the *Jury*, whereof *Bushel* was the Fore-man, would not find them Guilty: The Court, mighty angry, Fined and Committed the *Jury*, [illegible] for cause, that they (the *Jurors*) [illegible] the Law of the Realm, against [illegible] and manifest Evidence, and against the Direction of the Court in matter of Law, to them in Court openly given and declared, had acquitted the said *Meade* and *Penne*: But upon long and serious Debate, it was after adjudged, the Commitment, Fining, &c. was unlawful, and accordingly the Jury were discharged, &c. Another time also a Jury-man dissenting with all the rest, and that no less than two days, the Judges asked him what he would do? Says he, rather

starve

starve and dye in Prison than consent; the Court fined and committed him; But on better Consideration, discharged him without more ado: All the Court can do, being only to (carry them in Carts, if in the Circuit, along with them, and) keep them without Meat, Drink, &c. till will agree, 41 *Ass.* 11. says *Mir. Justis* ought not to be threatned, but to be free, differing in Opinion, &c. 273. And it was resolved in Parliament, *Anno* 1667. That the Presidents and Practises [illegible]ning, &c. *Juries*, in or for giving their Verdicts, are Illegal. And *Keeling*, Chief Justice of *B. R.* was called to Question in Parliament for such Practises.

Coke upon *Lit. f.* 369. says, If any Labour a *Jury*, Instruct them, or put them in fear, or the like, it's Punishable, as Maintenance or Embracery, either at King's Suit, or at Parties; and perhaps, it would puzzle one to shew, why a Judge is not within this Law; for how can he be said to do this as a Judge, when to do so is no part of his Office? And why should any usage alter the Case here, any more than in other Cases of break-

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ing the Laws; it's much too, any Judge should offer such a thing, considering he that judges without a *Jury*, certainly judges without Authority: And he that judges with a *Jury*, but governed or led by him, judges only by colour of a *Jury*, and by colour of Authority, and thus makes himself forsworn in and by the Oath taken at his being Created Judge, makes the *Jury* all forsworn, violates the greatest Privilege of the Subject, infringes the most often confirmed Law of the Kingdom, and also does particularly the Party offended the greatest Wrong imaginable, in as much as by colour of Law, and makes all the *Jury* accessaries to the whole.

Hence it's improbable any Judge should offer the contrary: But however, a *Jury* in any Indictment, Presentment, or Information, ought, and may give their Verdict, &c. according to their own Conscience, without any fear of Punishment one way or other.

And in any other Case, as where the King is no Party, but an Attaint happens to lye, they may be punished no other way. Also no Punishment what-

ever lyes for or against a *Jury*, which consists of above Twelve Men, 14 *H.* 7. 15. Nor does Attaint ever lye where the Witnesses are not on Oath, or for going against what any such Witness says; nor in any Appeal of Maim, Murther, or Felony, *F. N. B.* 107. Nor in other Appeals, as *Regist.* 122. *Attaint.* 59, 62. & 22 *Ass.* 82. say. Nor does ever any Action lye against any *Jury* for going against their Evidence; And where an Attaint is brought, it must be Tryed by a *Jury* of Twenty four Men.

The only Cases the Judges have any Power over *Juries* in, are, where in their Behaviours they become guilty of any such thing as the Judges may justly call an unlawful Contempt, 4 *E.* 4. 27. 36 *H.* 6. 27. Or be guilty of Embracery, 3 *E.* 3. *c.* 10. 34 *E.* 3. *c.* 8. as receiving Bribes, Promises, *&c.* before or at the Tryal, *&c.* *Or in Case of Concealment, The Justices of the Peace of every Shire, &c. may take by their discretion an Enquest, &c. to enquire of the Concealments of other Enquests taken afore them, and afore others, of such Matters*

and

and Offences as are to be inquired of presented before Justices of Peace, whereof complaint shall be made by Bill or Bills, &c. And if any such Concealment be found of any Enquest, &c. had or made within one year, &c. The Justices may Amerce or Fine them at Discretion.

3 *H.* 7. *c.* 1. viz. as much as is reasonable for such Offence, as is said in a like Case by Lord *Coke*, 10. 140. and in *Dalton*, *p.* 541, 23. If any refuse to be of a *Jury*, not offering sufficient Excuse, he is Finable, 7 *H.* 6. 12. So if any of either *Jury* give a Verdict, *&c.* as aforesaid, twelve not agreed. So the *Grand Jury* may not discover Evidence given them, *Inst.* 3. 107. *Mich.* 15 *Jac.* in *B. R. Smith* and *Hill's* Case, 27 *Ass.* 63. *Lamb.* 402. *Citron.* 267, 272. *Finch*, 29. So the *Petty-Jury*, if without License of Court, depart any whither upon any Occasion whatsoever, after sworn, before Verdict given: Or that while, but especially after Evidence given, eat or drink: Or out of Court receive any Evidence from either side, may expect Fine and Imprisonment.

Thus much for what a *Jury* may do:

Now something more how, and what it ought to do. The Oath it self, but that it's so general, would else be Instruction as well as Obligation sufficient. The Oath of a *Grand Jury-man* is, *I will diligently enquire, and true Presentment make, of all such things and matters as shall be given me in Charge, or shall come to my knowledge concerning this present Service. The King's Council, my own and my Fellows, I well and will truly keep secret. I will Present nothing for Malice, Hatred, or Evil Will: Nor will I leave any thing unpresented for Love, Favour, Affection, Reward, or any hopes thereof. But in all things that shall concern this present Service, I will present the Truth, the whole Truth, and nothing else but the Truth. So help me God.* The Oath of the *Petty-Jury* is, *I will well and truly Try, and true Deliverance make, between our Sovereign Lord the King, and the Prisoner at the Bar, according to my Evidence. So help me God.* That of the *Grand Jury* was part of it Anciently, *Quod neminem accusare velint innocentem*, To accuse no Person innocent, *Ll. Ethelred.* And *pour*

rien

rien ne levray que je verite ne diray. Nothing shall hinder me from speaking the Truth, *Brit.* 12. 135. *Crompt.* 304.

The Scripture teaches one his Duty upon an Oath: It says, *One must swear in Truth, in Justice, and Judgment, Jer. c.* 4. *Deut. c.* 16. *Exod. c.* 20. *Dan. c.* 5. *Levit. c.* 14. *Zech. c.* 13. *Acts c.* 5. and the *Proverbs* in several places. *In Truth*, with one's Eyes, neither in a Telescope or Microscope; not proceeding by appearance or seemingness of things, not by adding nor diminishing, not by aggravating or palliating, not by Equivocation or Reservation, not by Representing or Accepting the matter otherwise than really and truly it is, not presenting, *&c.* things, *&c.* doubtful, or not certainly true, as true; nor omitting any thing certainly true, but always as the naked Truth is, so and so. In *Judgment*, not at a venture, as by casting Dice, *&c.* not as matter of Form, not rashly, perfunctorily, or negligently passing or running over things, not by implicite Faith, or in complemental Obedience, *&c.* not upon trust or belief, further than with,

and

and upon good and great Deliberation, Considerateness, Reasoning, and Satisfaction according to ones own Conscience, and because one's mature and settled Judgment is so and so. In *Justice*, proceeding fairly, impartially, with Integrity, and according to the Merits of the Cause, without charging one with Murder that's Guilty but of Man-slaughter; and without Malice, Fear, Hope, Pity, Favour, Affection, Passion, Corruption, or other Prejudice, Byas, Consideration, or private or sinister End or Design: But all throughout purely, because is so and so more than otherwise. And consonant to Scripture, as well as generally in all other things, so also in this are even Morals and Politicks. The Wise Men (so called) of *Greece*, were called so from their being Prudently, Justly, and Honestly, such also are they *Aristotle* calls so, 1 *Metaph.* &c. The *Stoicks* say, He's the Wise Man that sticks to Truth, *Neque* [illegible] *fingit*, and abhors and banishes every thing else, not so much as admitting of any Shoots, Fictions, &c. whatsoever. *Machiavel* says, *Judex cujus-*

quam

quam gratiæ nec potentiæ cedet, neque misericordia nec invidia nec odio comovebitur sed vere semper & incorrupte ex legibus judicabit. Judges must not be moved for the Power of any one, nor for any ones sake, one way or other, nor with Pity or ill Will, but always go according to Law, truly and without Byas. *Justinian* speaking of Judges, says, *Eorum est manus puras Deo, Imperatori & Legi præstare.* They must be inoffensive to God, the King, and the Law. *Non illum populi fasces, non purpura regum flectunt,* No Acclamations of the People, no Honours of the King, neither of these move them. *Contra rempublicam, nec contra jus jurandum amici causa, vir bonus non faciet.* Against the common good or an Oath, no Man will stir an Inch, if honest, though it be for a Friends sake. *Judex ponit personam amici cum Judicis induit.* Judge *Hales* is a Friend, as *Hales*, but none as a Judge. *Si omnia facienda sint quæ amici velint non amicitiæ tales sed conjurationes putandæ sunt. Cicero.* What a Judge does at the Request of his Friend, is really and truly

no Friendship, but in making himself and Friend guilty both of a Crime. The *Areopagites* (were Judges that) heard Causes only in the dark, that they might take Notice what was said, and not who spoke. And what is said of Judges by these Authors, must by us in like manner be applyed to *Jurors*. The Book whereon Swearing one layes one's hand, is God's Everlasting Truth, and most Holy Word; so that if one forswears one's self, one virtually in so doing utterly forsakes God, and his Mercy and Truth. Says a Learned Man, part of the Oath is, *So help me God*, *viz.* I pray God he will never help me, if I shall not sincerely and faithfully keep this my Oath. *Cajetanus* says, 2 *Qu.* 98. Perjury is of it's Nature a Contempt of God. And as the Proverb says, *Malum est ludere cum Sanctis*: It's however ill jesting with edg'd Tools.

By the Oath of the *Grand-Jury*, one's bound to observe as well the Charge which shall be given by the Court, as the Form of the Oath it self. But this it's plain must be understood, so far as

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the Charge is according to Law, and not contrary or repugnant to the Oath itself, and no further or otherwise.

Anciently the Charge was given in Writing to the *Jurors*, *Brit*. 9. *Bract*. *l*. 3. *c*. 1. *Dalton p*. That the *Jury* might easier remember it, their Minds be refreshed, and perhaps, themselves Edified, &c.

What the *Grand Jury* does, is by way either of Presentment or Indictment. *By Presentment*, when they know of a a Crime or Fault themselves, and give a short Note of the Parties Name, place of Abode, and Fault, without Form, referring it to the Court to put into Form. *By Indictment*, when the Party and Fault are ready brought them in Parchment, drawn up in Form: And indeed, the most true difference is only, that the one is in Form, and the other not.

In an Indictment, first they must consider and understand it well and throughly: And if they cann't understand it, ask the Assistance of the Court, either to give them a Clerk on Oath to *English* it for them, or otherwise as need shall require.

Then

Then they must consider, if the Fault, as alledged, with the Circumstances and Aggravations, amount to, and be a real Fault or not, and also worth complaining of; for *De minimis non curat Lex.* The Law minds not every little thing, and this is daily experienced in Indictments and Ac. of Case. If it be no Fault, or one not worth complaining of, which in Law, as aforesaid, is all one, they reject the Bill, and meddle no more with it. If they find it a Fault, and considerable, as aforesaid, then they consider, if know it true so of themselves; which if they do, or other Evidence satisfie them it is, they Indorse, or write on the Back-side of it, *Billa vera*, this Bill is true: But if they do not know it themselves, nor be satisfied by the Evidence, then instead of *Billa vera*, they write *Ignoramus*, We know not: And afterwards thus deliver all the Indictments into Court.

The Clerks of Court, to get Fees, and perhaps, some others for one sinister end or other, will be apt to say, that the *Grand Jury* ought to find an Indictment,

or

make a Presentment against any supposed Offence or Offender, though have but colour of Evidence, or a probability of the thing being true, and that what they do is but matter of Course, a Ceremony; matter of Form, barely an Accusation, &c. But that this is not so indeed, is apparent, for what end then is a *Grand-Jury*? Only for show. The Law would certainly then have never required one to be at all. We see they are obliged to be Sworn, and they are as much on their Oath as any other *Jury*, which then should be the contrary. The very form of their Oath teaches us better. The Oath is, *Diligently enquire*, &c. not *negligently*, &c. *True Presentment make*, not *probable*, &c. *Nothing for lucre*, &c. not excepting the Clerks, &c. *According to Evidence*, not *Presumption*: *The whole Truth, and nothing else but the Truth*, which how can be at such a rate as the Clerks, &c. speak of?

But then they Object, that these words, *According to the best of one's Knowledge*, are added. If they be, it's against Law,

Mir.

Mir. 304. *Brit.* 12. 135. And altering an Oath, is imposing a new one, which cannot be without an Act of Parliament, *Inst.* 2. 479, 658, 719. But however; May *Jurors* in such case wink, *&c.* that they may not know, *&c.* These words are *best of*, &c. and not *worst*; they are *Knowledge*, not *Ignorance*; they imply the *best* one *can* know or find out: And not only what one already *does* know, for then what need the word *best*? And besides, they relate to the word *enquire*, as well as any other word, *&c.* So the more one considers them, the less one shall find they really alter the Oath.

Then, say they, all a *Grand Jury* does, is but presenting in form, and not in form as aforesaid, and is only suppositions as it were, and nothing positive or certain, grounding themselves only on this, that the Form of the Indictment is, *The Jury upon their Oath Present*, instead of *The Jury upon their Oath say*; and so infer, that if any thing in the Presentment or Indictment be false, yet it's no Perjury. Alas, to see Men in extremity, what hold they'll catch at! Could

Argus

Argus himself have seen this Exception? No, unless blind. *Present* and *say* are undoubtedly here, and in such like cases, Synonimous Terms. To *Present* on Oath, is to give the Court to understand on Oath. And to *say* on Oath, is to tell the Court on Oath; and an infinite of Indictments be *say* instead of *present*, *Rast.* 263. *Kitch.* 100. *Co.* 9. 114. And *Fleta* goes so far, as calls an Indictment a Verdict, *f.* 115. The words also of the Oath be, *to truly present*, and not *say*. And Lord *Coke* plainly calls the *Grand Jury-men* all wilfully Forsworn and Perjured, if wrongfully find an Indictment, *Inst.* 3. 33.

Then, say they, but Indorsing *Billa vera*, as aforesaid, implies not that the Jury takes upon them to know, or say, the Bill, or the Contents, are true; but *vera* there signifies probable, or fit for Enquiry. But then, why not another word used more properly and usually *Latin* for such a sence than, and instead of *vera*? And what is *Latin* for true, if it be not? And is not true, the common accepted *English* word of, and for *vera*? And is not *Billa vera* the Answer made

made to their Oath, that they ſhall true Preſentment make? This is like the reſt.

Then, ſay they, this is no Tryal, but in Order to bring to Tryal, and the Party is at no prejudice if the Bill be found. It's true, it's no determinative Tryal that finally concludes either Party, becauſe it's but one of two, which every one accuſed of a Crime muſt have as aforeſaid. But it's ſo much a Tryal, as Learned *Fleta*, *f.* 113. looks upon it no leſs one than any other. The form of their Indictment is the ſame of that of a Verdict. All things are, or ought to be alike in the whole Proceedings, and to differ nothing, but the one to be before the other, and the latter to be final, the other not. The *Stat.* of 23 *H.* 8, *c.* 23. Enacts, One ſhall be Indicted of High Treaſon in what County the King pleaſes. And the *Stat.* 1, 2 *P. M. c.* 10. ſays, That Tryals for Treaſon, ſhall be according to Common Law: This Act repeals the other, though ſpeaks only of Tryals, and the other of Indictments, *Mirr.* (1.) 104, 105. *Inſt.* 3. 27.

which

which shews an Indictment is a Tryal. One of the *Grand Jury* cann't be afterwards on the other: And why? says the Law, for he has once already found the Party Guilty, and if should not again, he must Perjure himself, *Brit.* 12. 25 *E.* 3. c. 3. 7 *E.* 4. 4. *Stanf.* 158. It puts the Defendant to Disgrace, Trouble, Damage, Danger of Life, *&c.* It makes him lyable to an Out-lawry, to Imprisonment, *&c.* and to every thing but very Death, *&c.* the final Judgment it self. It gains Credit, and gives Authority to another *Jury* to find one Guilty. It produces this Effect, that if the other *Jury* find one guilty never so wrongfully, no Attaint lies against them, nor other Punishment: And what's the Reason? The Law says, because he is found Guilty not by these other twelve only, but in all, by Twenty four or more, this latter and the other *Jury* too, *Attaint.* 64, 60. *Attaint R. a.* 18. *v.* 8. *H.* 4. 23. 14 *H.* 7. 13. So if one be Indicted, any one may bring an Appeal, though never so wrongfully, *&c.* against him, whereas he that brings one against

any

any one that was never Indicted of the same Offence, may be liable to great Punishment, if wrongfully brought, *Stauf.* 172. [b] *Coron.* 178. 40 *E.* 3. 42.

Where Peers be indicted for Treason, Felony, or Misprision of either, they not only suffer in Honour, Liberty, Vexation, Danger, Trouble, Charges, and other Inconveniencies, as aforesaid, another does, but must with a more tender sense, and in a much greater measure, as they be so much greater Persons, *&c.* And they can have no other Tryal on Oath, for their future Judges or Jury are none of them on Oath, *Inst.* 3. 89. *Co. L.* 156. They can except against none of their Jury, though have what cause soever possible, *Co. L.* 156. [b] They must be Tryed by such as shall be chosen against them, such, as perhaps, shall not be Neighbours, but picked any where up and down the whole Kingdom; such a Jury, as perhaps, shall not be above twelve in all, whereof then if any seven, or any time the major part agree to find them Guilty, it shall be so, though the other five, or lesser number, be utterly against it;

it; So that upon the whole, if a Peer have but seven Peers among all the rest that bear him ill will, or either any ill wisher, that can make him so many of them his Enemies, he must Dye, &c. fall back, fall edge. And to help the matter, he shall always be sure of the ablest Council in the Kingdom, to manage the Cause against him.

Suppose one should ask any Honest Man this Question: Were he not on his Oath, yet would he find an Indictment of Course, &c. to expose one, and put him to such Inconveniences, as aforesaid? Certainly, says he, No. And the Monster that would, does it wrongfully, because is not certain he does otherwise. And being on his Oath, as aforesaid, it's not only doing wrong, but staining himself Crimson red in Perjury too; here's a Malicious way of doing wrong. It's doing wrong also by colour of Law and pretended Authority, the greatest Mischief and Injustice, says the Lord *Coke*, of all other, *Inst.* 2. 28. The damage, &c. too in all these Cases is the greater yet, that the Party can

very

very scarcely, if at all, expect any Reparation or Amends: Whereas in all other Cases he may easily. For against the *Grand Jury*, or any of them, no Action lyes, in as much as doing what they do on their Oaths, the Law will not presume, &c. any Malice, &c. in them. And though one be Indicted at the Instance, or upon the Endeavours of some other Person, (all the *Jury*, aforesaid, being sworn to Secrecy) can one easily discover, and prove who this Person is, what he did, and prove it at a Tryal? Which yet one must do fully, if expect any thing but making bad worse. And might one recover damage, &c. yet it's damage, &c. to be put to the Trouble and Hazard of the Recovery. Well therefore, says *Fleta*, *f.* 52. *Valde necessarium est in omni presumptione in inquisitione de vita & membris; Juratores diligenter examinare*: It's an exceeding necessary thing, that the *Grand Jury* should make diligent Examination, before presume any thing, either in Case of Life or Member. *Just. Dalton*'s Book, *p.* 339. says, no less Care or Concern at all lies

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on the *Grand Jury*, than does on the *Petty Jury*.

The Law, (to see its Nature, how it inclines generally, that one may the better guess in this matter) it is not with us like those of *Draco*: It's as tender of the Lives, Liberties, and Credits of the People, (none can deny in all cases else) as a Mother of her Child, and why then not in this also? It will presume nothing dishonest, *&c.* in any one, or any time, but it will, and always does presume all Persons and Things Honest, True, Innocent, &c. till the contrary be proved, *Co. L.* 78. *b* As *Ovid* says, *Sit piger ad pœnas princeps ad præmia velox.* So *Lamb. Sax.* Laws cry often Clemency and Forgiveness as well as Justice. And *Lex Anglia Lex misericordia est*, Says *Coke*, *Inst.* 2. 315. Like the Laws of Scripture, whence it was first derived, which shews Mercy is not opposite to, but part of Justice, 1 *John* 1. 9. *Psal.* 71. 1, 2. *Jer.* 18. 7, 8, 9, 10. *Ezek.* 33. 13, 14. The Laws of *England*, the Laws of Mercy. And says a Great Man, *Justitia semper mitiorem sequitur partem.* Justice

leans that way which is the milder. One brings an Appeal, if the Jury be doubtful, the Defendant shall be acquit, and the Appellour imprisoned, *Fleta* 52. *Mir.* 224, 273. So a Jury being doubtful if one were a Villain or not, was therefore free, *Fleta* 238. *Bene tibi præcipiunt* (says *Cicero*) *qui vetant quidpiam agere quod dubites æquum sit vel iniquum; æquitas enim lucet ipsa per se, dubitatio autem cogitationem significat injuriæ.* They do well, that forbid one doing a thing when dubious, whether right or wrong; for where it's right, the thing is necessarily as clear as the Sun: But any doubt speaks the thing not to be so. As if a Physitian give one Physick, he must give one that he is sure will do one good, or no harm, and not what he doubts may do one harm. It's also plain, if I doubt, I must not say, I am certain, (as *Billa vera*) but I know not certainly, (as *Ignoramus*) else I tell a Lye. It's very remarkable too about all Indictments, the *Jury* only says, either *it's true*, or *we know not*, and never that *it is not true*; which shews, if they be doubtful, or not fully satisfied,

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the Indictments must be Endorsed not *Billa vera*, we know it is true, but *Ignoramus*, we do no not know it is true. And the Law does not put it upon the *Grand Jury*, to say the Bill is not true, if they do not find it, though does put it upon them to say positively, the Bill is true, if they find it, and so encourages the finding Indictments *Ignoramus*. *Fortesc.* says, It's better Twenty ill Men were unjustly saved, than one unjustly Condemned, 62. For Mercy and Pity is on the one side, but on the other Injustice and Cruelty. Says *Bracton*, *Tutius est reddere rationem misericordiæ quam Judicij.* It's safer giving an Account of one's being Merciful, than otherwise. The *Saxons* in doubtful Cases only Appealed to God for Discovery, and left all only to him, *viz.* Where the Case was doubtful, if Guilty or not, or clear and manifest Proofs wanted, they had four sorts of Tryal, *Spec. Sax. l.* 1. First, *Kamp-fight*, or by *Battel*. Secondly, *Fire-Ordeal*, by holding red hot Iron in his Hands, or walking bare-foot over it. Thirdly, *Hot water-Ordeal*, by putting

one's Arms up to the Elbows, in seething hot water. Or, Fourthly, *Cold Water-Ordeal*, by casting one into the Water with a Rope under his Arms. Whereof the three last were used, one or other of them, where the Party was most vehemently suspected; *Versteganus* and others. But Pope *Stephen* the 2*d*. by his Decree, utterly abolished them all, and afterwards so did the Parliament, 3 *H*. 3. *Memb*. 5. Judging it more fit the Party should be acquitted than prosecuted, where the Case was doubtful. So that one must know beyond all doubt, before say *Billa vera*, else say, *Ignoramus*, which is in *English*, we doubt, we do not know, we are not certain if it be true. *Paribus sententijs reus absolvitur*, *Inst*. 4. 64. And says *Brit*. If a Jury doubt at any time, they must find for the Defendant, 245, 130, 136, 219, 213. Judge *Frebern* was Hanged for judging one to Death, where the Jury were doubtful in their Verdict, *Mir*. 298. Anciently if a Jury Indicted an Innocent Man, another might be impanelled

But a Jury first past upon them, *Rot. Temp. R. S. Jo.* Lord *Hales* his Collections.

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to go upon this Jury, as Offenders, *&c. Mir.* 101. *Aussi sont homicides de volunt, faux Jurours & ceux que Endictent fauxement*: Jurors that falsely Indict any one, be guilty, of wilfully killing Men, *Mir.* 34, 36. They shall be reputed and adjudged Infamous, and suffer Corporal Punishment, that find an Indictment against an Innocent Person, *ibid.* 251, 252. 254. 256. Or, if an Innocent Person be adjudged to Death, *&c.* if they could have holpen it, *ibid.* 256. An Appeal lay against a Jury in such Cases, *ibid.* 126. *Brit.* 14. 137, 237. If they any wise offend so, *Ignorantly*, yet this excuses not at all, unless they could not possibly know better, *ibid.* 257. And negligence in, or of knowing better, makes their fault the worse, *ibid.* And the greatest Oracle of our Laws, *Co. L.* 115, 391, 45, 94, 113. has it, That whatever was Law, is yet, unless altered by Act of Parliament, which this never was. Whereas on the other side, if a *Grand Jury* do not find the Bill against any one, there can be no harm then to any Body; but another Indictment may some other

time be brought, when there's better Evidence, or a worse Jury. For though one's Life, &c. shall come but once in danger, or on Tryal, before the *Petty-Jury*, it may yet a Thousand times before the *Grand-Jury*, for they never say the Party is not Guilty, but at most say *Ignoramus*, as aforesaid.

Any thing any Jury does, ought be *Quoddam Evangelium*, like what they laid their Hands on, taking their Oath. When they write *Bills vera* on an Indictment, they undeniably compare the Truth of the Contents therein, to the Truth of the Gospel, and this upon Oath. Thus one would admire how it comes to pass, that they of the *Grand-Jury* should often hear but one side: Their Oath, it's apparent, is against this: It says, *Present the whole Truth*, not concealing or omitting any part of it; which implies as well all one side can inform them as the other. And so appears by less strong Cases far, an Attaint lies against a Jury (swearing to well and truly Try the issue between the Parties) when every word of the Verdict may yet be true, only

only it not being the whole Truth. As if one having had common appendant time out of Mind, bring an Assize of the Common, making his Title that he hath had common time out of Mind, *&c.* (without speaking of the Appendency) and so the Jury find for him: For thus he should else have Common in gross, when his Right or Title is not to *such*, but to Common Appendant, *F N B.* 107. *a.* 10 *E.* 4. 17. 49 *H.* 6. 17. So one having had a Rent in Fee, as Forrester of such a Forrest, time out of Mind; in an Assize for it, makes Title, by saying he had a Rent out of that Land, time out of Mind, *&c.* (without saying as Forrester, *&c.*) and the Jury find for him, for he hath not had the Rent by Prescription, as must be understood by the Claim and Verdict, as aforesaid, *ibid. b. Co.* 5. 78, 79. So that it is not enough for a Jury to say the Truth, but the whole Truth, though too no such Word as this of whole Truth, be mentioned in the Oath. It proceeds, and says, *And nothing else but the Truth*, which how can possibly,

or any *Jury-man* be satisfied in, unless hear both Parties? It says, *You shall diligently Enquire*, &c. not by halves, or but hearing one side only. It's a Maxime, *Qui statuit aliquid parte inauditâ alterâ aquum licet statuerit haud aquus fuerit.* He that judges or determines any thing, when but one side only is heard, does unjustly: And the Judgment, or Determination, though in self be never so just or right, yet shall he no wise be accounted a Just Judge, *&c.* Is it not a common Saying, *One Tale is good, while another is told?* One at this rate might be Indicted for a Cut-purse, when but an Honest Glover; so might Chyrurgions, Sheriffs, Bayliffs, Jaylors, Hang-men, Attornies, *&c.* for but doing what belongs to their several and respective Professions, as the matter may be managed, and yet saying nothing but Truth neither, only not the whole Truth. Is there not in all Determinations else, the Hearer and *Defendant*, as well as *Complainant?* Thus erred *Judah* the Son of *Jacob*, in judging *Thamar* to be Burnt, upon Report, when she was unheard, *Gen.* 38. 24,

24, 25, 26. So was *Joseph* falsly accused of Lying with his Mistress, and cast into Prison, *Gen.* 39. 19, 20. So was *Mephibosheth* falsly accused by *Ziba*, and deprived of all he had, 2 *Sam.* 16. Which being all Presidents, and Damned in Scripture, must, or shall any one be so hardy as to embrace and follow them now? Either one's Guilty or not; if he, let him yet have fair play for his Life, *&c.* If not, why should he then be Indicted? So that, why should he not be heard? Else one's Condemned first, and Heard after; or indeed Hanged first, and Tryed after, or little less. The true intent of the Law herein seems, as if Men were to be handled not thus, but that the Defendant should be heard at first, and if he then could give satisfaction, *&c.* he might be at no further trouble, *&c.* And if he could not, that he should have such trouble, *&c*, and having Notice thus, might prepare himself the better, and so not be surprized at the final and concluding Tryal, or have any colour of Pretence that he was surpriz'd, or any wise unprepared at this final Tryal.

This method being most Honourable for the King and the Law, and also most safe for the People. And the Reason why it was ever otherwise, seems barely a Result of some Artifice of the Clerks, to get themselves Money, imposing on the *Jurors*; or from this, that Presentments being made without the Party heard, therefore the *Jury* thought they might find an Indictment likewise. Whereas, they ought always to distinguish; for a Presentment is on their own knowledge, when they know all the whole matter, even what the Defendant can say for himself; but an Indictment is found upon Witnesses, which tell their Tale to a hairs-breadth, *&c.* as makes the most for the side they are produced of. And at length after some few Presidents, it has now grown into Practice: *Dato uno absurdo mille sequuntur*: All can be pretended why it should be so now, is but Practice and President. And when it's against Justice, against Truth, against any ones Judgment, sure one ought rather to Correct than Approve of, or follow such Practice or President. At least

leaſt wiſe a *Grand Jury* ought hear both Parties, if preſent, or eaſily, or conveniently to be heard.

It would likewiſe amaze one, to ſee how the Clerks, for their Gain, or others for other Ends, have often prevailed with Jurors to find a Bill true, *&c.* when in all the Circumſtances of Aggravation, or moſt of them, falſe, if not in the Fact it ſelf; and thoſe Circumſtances too altering the very Fact, as alledged about as much as white Feathers would a black Crow.

Conſidering how true Preſentments, Indictments, and Verdicts ought to be, and that the whole Truth, and nothing but the Truth muſt, or may be in them: That the *Jury* undertake the Bill is altogether true, not only as to the Subſtance, *&c.* or in general, but even in every particular, all the Circumſtances, Aggravations, and every individual word, (for if it be not true in the leaſt word, it's not true, but falſe, and Perjury.) *Stanf.* ſays well, *f.* 96. [b] *De faire bon Enditement eſt requiſite a conuſtre & d'aprendre que ſera dit Treaſon ou Felony*

lony or non: To perform the Duty of one on the *Grand Jury*, it's neceſſary to learn and know what's called Treaſon, what Felony, *&c.* and what not: Hence alſo one learns, one muſt not in an Indictment, *&c.* call, or ſuffer called Felony, Treaſon; Man-ſlaughter, Murder; nor one Crime by the Name of another: Or mention, or ſuffer mentioned, words ſpoke, or things done, other or after another manner than really or truly were ſaid or done; and therefore the Judges give the *Grand Jury* to this day their Charge ſo diſtinguiſhing, particular, and directive of all, and all manner of the ſeveral Crimes, their Natures, and how to call them, *&c.*

When the Clerks draw an Indictment, Information, *&c.* they'll not only alledge and inſert in it the very Fact, *&c.* one is accuſed of, but craftily, and full of Art, ſtuff and load it, into the Bargain, with ſeveral fictitious and ſleight Allegations of their own, to ſwell up, and aggravate the matter; as Circumſtances of Malice, or Deſign, *&c.* in the Party, when did the Fact, ſpoke the words, *&c.*

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So that ſometimes from a Mouſe, a Mountain; from nothing, or what's inconſiderable, it will in ſuch a Dreſs ſhew and ſtrut like a Giant, a Monſter, &c. And all this, forſooth, they'll call matter of Form, and then endeavour to perſwade a Jury, if they find the chief matter, or that part which they'll call the matter of Subſtance, true, they muſt of courſe find all the reſt, which *they* pleaſe to call matter of Form, true alſo. This uſual way of wording Indictments is ſo notorious, dangerous, hurtful and grievous, that it ſeveral times, and in all Ages, has been complained of by all Perſons whatſoever, except the Clerks and Proſecutors themſelves, whilſt Clerks and Proſecutors. It has been a Complaint in and of Parliament, by King, Lords, and Commons; See 4 *H.* 4. *c.* 2. 37 *H.* 8. *c.* 8. This is that whereof may be ſaid, as was in *Courtin Hertſey*'s Caſe, *Aliquid creare ex nihilo malum, Diabolicum eſt.* It's the part of the Devil himſelf to make a ſmall fault be, or ſeem a great one. But no Complaint, no Argument will, or can prevail with a Covetous Clerk, getting

getting Fees, or a Malicious Profecutor, troubling whom he has Envy or Malice againſt, to deſiſt their Advantage. And as the true Circumſtances of any Crime do always, or moſtly aggravate or alleviate it, and all thoſe ſuggeſted thus by the Clerk, if the Bill, &c. be found by the Jury, (though pretended only matter of Form) become thus as true, and the Judges muſt adjudge a Puniſhment accordingly, as if all were really true: Thus is a Trap ſet to catch the Jury and Defendant; the Jury to Perjure themſelves, and wrong the Defendant, and the Defendant to be adjudged of a Crime, when perhaps guilty of none, or at leaſt of a worſe Crime than truly he is. A Jury therefore, ought firſt conſider, as aforeſaid, if the matter of Subſtance, or chief matter, be Criminal at all; and if be, then if conſiderable: And if be not Criminal, or conſiderably Criminal in it ſelf; then if the Circumſtances, as alledged, make it ſo; and if not, then to reject it. If it be conſiderably Criminal, with or without the Circumſtances, then conſider if you know it of

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your selves, or by Evidence be satisfied it is true, both it self and the Circumstances: If the matter it self be not true, you reject the Bill; (for where's no Body, is certainly no Shadow:) If the matter be true, but the difficulty be about the Circumstances, then consider if they be material; if not, you find the Bill; if be, then consider if they be consistent, or the matter will bear them; if not, then reject the Bill, *&c.* or at least strike them out of the Bill, *&c.* If be, then consider if they be true on your own knowledge, or by the Evidence given you; if be, then find the Bill, *&c.* if not, they must be struck out, or the Bill return'd *Ignoramus*, &c. As for Example, The *matter* must be *Criminal and Considerable*: This partly appears before; but further, Suppose the Apprentice of *A.* get a Woman with Child, and secretly run away upon it, and *A.* procure a Warrant to Apprehend him for it: But *B.* a Stranger knowing of the Warrant, Lodges, Comforts, and Assists the Apprentice in unknown places, that the Warrant cann't be served; the

Stranger

Stranger is not punishable, 15 *Jac. B. R. Vaughan's c.* If a Commission be granted to two, and one of them execute it alone, without the other, and accordingly Fine People, *&c.* yet no Indictment lies, for it was an Error of Judgment, 27 *Ass.* 23. If one say to a Justice of Peace, Executing his Office at his House, *&c.* and not on the Bench, certain scandalous words, touching his Office of Justice, yet he may not be Indicted for it, *Hides c. Trin.* 11. *C.* 1. *B. R.* And so was Sir—— *Sackfield's c.* these being all inconsiderable Faults. And as to whether *the Circumstances*, or other matter than the Principal, *be material or not*: Those words or parts be only words of Form, and but those only which are necessarily implyed, as that if the Principal, or the rest, be true, these must be so too, and cann't possibly be otherwise, and thus become needless to be proved, being before proved, as and by the necessary consequence of the other Proof; so he that proves a Shadow, proves also a Body, since there must be a Body to cause it; and those words be material

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which may cauſe a different Judgment or Puniſhment, or that aggravate the Fault, make it greater, of another Nature, or any wiſe alter it, and therefore are not to be preſumed, but muſt be proved. The Jury muſt obſerve alſo *whether conſiſtent*, as an Indictment of or for Felony, ſaying, that one ſuch a Day Feloniouſly cut down ſuch Trees, and carried them away; or with Force and Arms ſuch a day cut down ſuch and ſuch Trees, and Feloniouſly carried them away; this is inconſiſtent, for Felony can never be about ſtanding Trees, *Indict.* 4. So of growing Apples, of Houſes, or any thing fixed to the Free-hold: But all it can amount to, is only Treſpaſs, unleſs the falling appear by the Indictment to be one time, and the carrying away, another. So if a Mad-man, a Child, *&c.* which have no Diſcretion, be ſaid to do things maliciouſly, or deſigning any thing, this is inconſiſtent, or impoſſible, in as much as no Malice or Deſign can be in ſuch. *If neceſſarily implyed, for if be not, they muſt be proved*, &c. Every Jury muſt go by *Probata*, what's

what's proved, as well as *Allegata*, what is only alledged. Where one's Accused of knowingly keeping a Dog wont to worry Sheep, *&c.* the knowledge must be proved as well as the rest, *Cockram* and *Davies c. B. R.* 17 *C.* 1. So the Lord *Shaftsbury*, when sued Lord *Digby*, for maliciously speaking such and such words, he proved the malice as well as words. If one pleads a Feoffment by Deed, and the other denies it, it must be proved to be by Deed, *Co. L.* 281.[b] So if one be Indicted of Murder, as that he with Malice, Fore-thought, killed such a one, the Malice fore-thought must be proved; for in these Cases the killing might be either by chance, as the Glance of an Arrow, *&c.* by giving Physick, by a Champion in Tryal by Battel, by a Hang-man doing his Office, or by one *non Compos mentis*, &c. In which Cases is no Malice, and and therefore the Indictment not to be found: So the Words might be spoke in Jest, or a Thousand other ways, and not maliciously. So one might keep such a Dog, and not know he was such,

such, and the Fault would then be none at all in him. The Law also may several times be broke in the Letter, yet without any Fault, if the Intent of the Law be not broke: As when things are done to avoid a greater Inconveniency, or by Compulsion, or for Necessity, or by involuntary Ignorance, &c. And in these and such like Cases, the Party ought not be Indicted, though the matter be true in it self. The *Romans* had a Law, *He should dye that climbs over the Wall in the Night*; yet one doing so to discover their Enemies, was by the Senate adjudged Innocent, and Rewarded. So it's Lawful with us, to pull down another's House when a Fire happens, or in Time of War, to prevent a greater Mischief. So one being to appear to a Writ, but hindred by Floods, Sickness, &c. does not, he is Excused. One forces and uses one's hand to kill a third Person, he is only Guilty: So an Infant, or one *non sanæ memoriæ*, kills another, it's excusable. So that where any Fact or Words in an Indictment might be as well under

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any of these Circumstances, as what other the Clerk or Prosecutor is pleased to alledge, these alledged must be proved, for it's plain, are not necessarily implyed. And yet if a Man should do any wise thus, the Clerks will draw up the Indictment or Information, as if none of these Circumstances were in the Case, but that it was Maliciously, in contempt of the Laws, &c. So it seems hard a Man should be Hanged for stealing under a Necessity, where the taking is upon absolute Necessity indeed, and it's not the Parties Fault, but Misfortune, he fell into such Necessity: And especially if the Party whom the taking is from, have not the like necessity for the same thing, or the Person that takes, be very Serviceable or Profitable to the Kingdom or Common Good, &c. yet he must be, though the thing so taken be not of the Value of 13 d. if the Jury agree he did it Feloniously; whereas one Guilty of Perjury, though does one a Hundred thousand times more harm, shall only suffer an inconsiderable Rebuke. And why should

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a Jury in this Case find it done Feloniously, this was done under Force and Necessity, to preserve a Man's Life, &c. instead of an House, &c. and what's said Felonious, must be, *Felleo animo*, with an ill affected Mind; with a Mind not barely to do the thing, but an itching also to do Mischief; (only this itching indeed shall be presumed, unless Cause appear to the contrary.) As if one takes a thing out of another's Possession, claiming it with some colour as his own, &c. this is adjudged no Felony: Why? for not done with any Felonious Intent, as appears by his claiming, &c. So the like Stealing, as aforesaid, was not for Mischief sake at all, but for Necessity, &c. Thus *David*, against the Law, took and eat that Bread which was provided for the Table of God only, *Exod.* c. 29. 1 *Kings* 21. Our Saviour and his Apostles plucked off, and eat the Ears of another's Corn, *Mat.* 12. And he, because he had need of an Asse, took that was none of his, but anothers; and had *Lazarus*, ready to perish, taken *Dives*'s Crumbs against his Will, &c. yet it seems

ſeems he had no more ſinned than he miſ-behaves himſelf, that does what the Lord bids, and the Steward forbids, under the Rules aforeſaid. A Jury therefore, not obſerving the Rules aforeſaid, gives a Verdict not only againſt the preſent and immediate Defendant, but alſo in him even againſt *David*, *Chriſt*, &c. repreſented thus in his Caſe. In the Civil Law, (that of the Admiralty particularly) if a diſtreſſed Ship takes water by force of another where is Plenty, it's no Theft; becauſe of the neceſſity, ſo adjudged ſeveral times. If an Indictment mention one Seditiouſly, and deſigning to diſturb the Government, and to withdraw from the King the Love of his Subjects, and ſaid of him ſuch and ſuch Words, here the Words might, perhaps, be ſpoken within the Priviledge of Diſcourſe in Parliament, or in a Jocular Way, or Ironically, when one means the contrary; or by way of Suppoſition, in Argument, or when one meant a contrary thing, or no harm at all; and this perhaps too explained at the ſame time in other words accordingly, or the Words

in

in the Indictment be but part of the Sentence, &c. or transposed, or some how else altered. So if a Complaint be, that one falsly and maliciously, and withal designing to break his Credit, and ruine his Trade, called such a one a Bankrupt, here, perhaps, he was a Bankrupt then, or no Tradesman at all; therefore in these and such Cases, the Circumstances alledged being not implyed necessarily, though the Fact or words were spoke, they must be proved. But to instance some Cases adjudged by the Judges themselves: If *A.* bring an Appeal against *B.* and *B.* is after acquitted; now, should *B.* Indict *A.* for maliciously, &c. bringing the Appeal, the Indictment ought not be found, if *B.* were Indicted before of the same Fault, he was after Appealed against for, because his being before Indicted proves there was at least colourable Reason why the Appeal was brought, and not Malice only, *Coron.* 178. 40 *E.* 3. 42. A Chyrurgion was Indicted, for that he by Negligence in Curing one's Hand, maimed it; the Negligence must be proved, 48 *E.* 3. 6. 11 *H.* 6. 18. So in

Actions

Actions for Words, which holds the same Law as in Indictments, *&c.* *A.* sues *B.* for falsly and maliciously calling him, being an Heir, a Bastard; Action will not lye, if *B.* pretend himself Heir, for then it was not maliciously, but only as it were in order to get or claim the Land, *&c.* And it's Lawful thus to slander another, justifying one's own Title, *Co.* 4. 10. So *Molton* sues *Clapham*, for that a Suit depending between them, upon reading certain Affidavits in Court, *Clapham* openly then and there, falsly and maliciously said, there is not a Word true in the Affidavits, and that he would prove it by 40 Witnesses; here the Words, though were agreed false, yet being not spoke maliciously, but out of other design, as in his Defence, *&c.* as aforesaid, Action does not lye, *B. R.* 14 *C.* 1. *Rot.* 459. So a Councellor calling one a Thief at a Tryal, the like; for it's not malicious, *&c.* if material for the Cause he manages, *Montagues c.* So where *A.* says to his Friend *B.* that *C.* hath the *French Pox*, therefore advising him not to keep him Company; for

spoke

ſpoke as Advice to a Friend, and not maliciouſly, *James* and *Rudley*'s *v.* 40, 41, *El. in B.* And thus is further ſeen the Cauſe or Occaſion of ſpeaking words, or doing any thing, muſt be conſidered as well as the Words or Fact: And ſays *Coke*, *This* is a *General* Rule, *Co.* 4. 14. Alſo it's another Rule, All Offences in Fact or Word, ought in conſtruction to be made the leaſt of poſſible. *Verba accipienda ſunt in mitiori ſenſu.* Words ſhall be taken ſpoke in that ſence which is moſt innocent, *&c.* See of this ſeveral Examples, *Co.* 4. 17. *Hob.* 473. *C.* 4. 19. *Co.* 4. 13. for the Law will *preſume* Innocency further than down-right proved, as aforeſaid, to the contrary. "And if *Juries* ſhould not "be cautious, as aforeſaid, one might "be Indicted, *&c.* for ſaying *The King* "*is a fit Man to Govern*, or for any "thing in the World. Suppoſe *A.* be "Indicted *for maliciouſly, and with a de-* "*ſign to withdraw the King's Subjects from* "*their due Allegiance*, &c. *ſaying, The* "*King is a fit Man to Govern*, and *A.* "ſhould be found Guilty of it, becauſe

"he said these words; *A.* would be in "a sad case, the Judges must give Judg- "ment, as if the Words were spoke "Ironically, or in a contrary Sence than "they were, for *so* the Circumstances al- "ledged import, *though be found of* "*course.* If a Jury find an Indictment, *&c.* with the Word *felonice* in it, they find one Guilty of Felony, be the Fact what it will, and so as a Felon the Defendant must suffer: So also if the word *proditorie*, for High Treason; and why may not they as justifiably find these words of course, as other not necessarily implyed? Where an Indictment, *&c.* is grounded upon a Statute, then every little Word must be proved that is also in the Statute, though seeming implyed, or little more than immaterial; this *all agree.* For want of these, and such like Observations, one *Tha. Burdett*, Esq; was Condemned, Hanged and Beheaded at *Tyburn*, in *Edward* the Fourth's Time, when the matter proved was only, that he being absent, the King hunted in his Park, and killed a white Buck, which Mr. *Burdett* fancied above the rest

reſt of his Deer, and that Mr. *Burdett* hearing of this, wiſhed the Bucks Horns in his Belly that Adviſed the King ſo to do, *Speed's Hiſt.* 700. Much like was it alſo with one *Walter Walker*, who was Beheaded in *Smithfield*, *Anno* 1476. when all proved againſt him, was only, that he (Living *at the Sign of the Crown* in *Cheapſide*, *London*) ſaid to his Child, to pacifie him when he cryed, *Peace, peace, Child, thou ſhalt be Heir of the Crown.* But who can open ſome *Jurymens* Eyes, to ſee how like an Ox led to the Slaughter they be impoſed upon, and cheated, to cheat others of their Lives, Fortunes, and all that's dear to them; though by their Example too of Acting thus, they make Preſidents, and give countenance to after Juries to be like themſelves, and conſequently expoſe and render themſelves, they know not how ſoon, in the ſame predicament, and to be puniſhed as the Criminal was they puniſhed. *Or by the Evidence given you.* "Evidence is only ſuch a Teſtimony "that makes ſomewhat relating to the "iſſue or matter in Queſtion clear, ma-

"niſeſt, and plain to the *Jury*; hence ſays *Coke Lit.* 283. *Probationes debent eſſe evidentes & perſpicuæ.* And thus is it, all the Witneſſes or Teſtimony in the World of things impoſſible, repugnant, inconſiſtent, *&c.* can be no more than *bare Teſtimony*, and cannot any wiſe amount to, or be called *Evidence*. Herein the Jury muſt conſider the Credit and Authority of the Evidence, and the matter or extent of what is Evidenced. *Firſt*, If the matter proved amount to ſuch plain and full Proof as is required. An Indictment laid againſt three Perſons, may not be found againſt all three, when the Evidence is only againſt one or two of them; nor if laid againſt one Perſon for three Faults, may it be found againſt that one for all the three matters, when but one or two of them are proved; nor when the Evidence is but to part of a Matter or Fault, may the Indictment be found for the whole; but, as aforeſaid, all found muſt be proved. Indictments, *&c.* as aforeſaid, brought upon, or referred to *any Statute*, the words of the Statute mentioned in ſuch Indictment, *&c.*

&c. must be proved very ſtrictly, even to a tittle; the Proof muſt hit the Bird in the Eye. As one Indicted on the Statute for *Maliciouſly diſturbing a Miniſter at Divine Service*, every one of theſe Words muſt be proved; ſo for *wilfully and corruptly forſwearing one's ſelf*; ſo *for one's gain keeping a Gaming-Houſe*. But in other Caſes, as *at Common Law*, if the proof and words in the Indictment, &c. differ either in the *matter*, or the *form*, or *manner*, inconſiderably, or ſo as the difference be not ſomewhat conſiderable or material, as aforeſaid; ſuch is indeed no difference in Law, nor by the Jury to be taken as any. In the *matter*, as in a Complaint for theſe words, *B. is a maintainer of Thieves, and a ſtrong Thief himſelf*; here the word *ſtrong* ſignifying little or nothing, need not be proved ſpoken, *Dy.* 21. 75. But if the Allegation and Proof materially differ, otherwiſe; as for theſe words, *If* B. *might have his will, he would kill all the true Subjects in* England, *and the King too*. Now, the Proof being that the Defendant ſaid, *I think in*

my Conscience, that if B. *&c.* the best Opinions in this Case are, that this is not sufficient Proof; for the Words alledged are more positive and absolute, and move Credit more in one's Ears than those proved, and so are not in effect the same, but materially differ. So of these Words, *B. procured eight or ten Witnesses of his Neighbours, to Perjure themselves*; the Proof being only that the Defendant said, B. *had caused eight or ten*, &c. This is no Proof, for one may be a *Cause*, and yet not a Procurer, there being remote Causes, *Causa sine quâ non*, as well as others so nigh, as that of procuring. Such a Cause as this *B.* might be, though only Plaintiff or Defendant in a Suit, for had there been no Suit, there could be no Perjury. And the most favourable and innocent Sence of Words is to be taken, and no other. As for the *manner*, An Indictment being for Murder *by Poyson*; if the Proof be, it was *not by Poyson*, but a Weapon, Burning or Drowning, *&c.* this will not do; for the manner proved, is of another Nature proved than alledged;

ledged; but if the difference were only thus, that the Poyſon alledged were of one ſort, and that proved of another, this being immaterial, (both agreeing it was by Poyſon) the Proof may ſerve. So Murder alledged to have been committed *by a Dagger*, the proof being it was *by a Sword* or Bill, may ſerve; but proof *by Poyſoning* will not do. If an Aſſault and Battery be alledged to have been *at A.* the proof being it was *not at A.* but *B.* may ſerve, provided the Offence be neither greater or leſſer, whether committed at *A.* or *B.* But if the place alledged aggravate the Fault, it's otherwiſe; or if both places be not in the ſame County. So of the like difference in time alledged and proved. *Now*, as to the Credit and Authority of what is Witneſſed: "It's "no proof or Evidence to a *Jury*, which "is againſt their own knowledge, nor "any other but that only, which "confirms them in what did know, or "acquaints them with what did not "know. The only Reaſon, ſaid my *Lord High Steward*, at Lord *Cornwallis*'s

Tryal, why a Prisoner is allowed no Councel in matter of *Fact*, or in any thing but matter in *Law*, when *Life* or *Member* is concerned, is only this, *The Evidence whereby he shall be Condemned, ought to be so plain and evident, that all the Council in the World may be presumed able to say nothing against it, or in his Defence.* Nothing ought so much as raise a suspicion, says *Horne*, but what comes from *grave and good People*, those which be *Credible*, and heed what they say, *Mir.* 200. And not from others, as ill-tongued, ill disposed, *&c.* People, *Bract. Brit. Stanf.* "The "great Lord *Coke* says, of old time (as "yet, says he, indeed it ought to be) "Any Indictment was not to be found "but on Credible Witnesses, and plain "and direct Proof; and never upon "Probabilities or Inferences, *&c.* *Inst.* 2. 384. The Famous *Montagne*, p. 1040. says, *à tuer les gens il faut un clarté bien lumineuse & nette.* And the Lord *Coke*, *Inst.* 3. 25. It's *most necessary*, as many hold, there should be *two* good Witnesses produced to the *Grand Jury* to prove

prove every Indictment: And the Proof, says *he*, ought to be *more* clear than *Light*. Every *Jury* must always remember, they may presume nothing but *Innocency*; and *Innocency* &c. *they ought*, until the contrary proved. Of Presumption and Argumentative Verdicts, *&c.* finding one Guilty, there be several very sad Examples. One the Lord *Coke* tells of, is, *There being two Brothers, one dies, leaving an Estate, and an only Child, the other Educates it, and one Night correcting it, it cryed, Good Unkle do not kill me, and next morning it was gone no Body knew whither. This Brother is Accused of its Death, upon Evidence of the matter aforesaid, that he beat it, it was Young, about Nine years old, it cryed as aforesaid, it was never heard of since, and that the Unkle enjoys an Estate by this. The Jury find him Guilty, and he was Hanged, but about a year after it returned safe and well*, Inst. 3. 232. The Scripture enjoyns the use always of *two* Witnesses at least, when yet the Punishment *then and there* was so much less than *now with us*, for the Crimes to be pu-

nished, *Deut.* 17. 6. 16. 19. 15. *Mat.* 18. 16. *Jo.* 18. 27. 2 *Cor.* 13. 1. *Heb.* 10. 28. *Vox unius nullius vox.* One is none, *l.* 8. *C. de testibus. Quædam sunt causæ quæ plures quam duos exigunt testes, nulla tamen quæ unius testimonio terminentur*, says the Civil Law. In some Cases there must be more than two Witnesses, but never fewer, *c. Licit.* 23. *in fin. extr. de test.* By the Ancient Laws of *England*, no Indictment was to be received against a *Presbyter*, without three, or at least two Witnesses; against a *Cardinal Deacon* without twenty six, or at least twenty four; against a *Cardinal Presbyter* but with sixty four, or at least forty four; nor against a *Cardinal Bishop* without seventy two Witnesses. *Lamb.* 178. The general Rule is, *In ore duum vel trium stet omne verbum si modo sint omni exceptione majores.* Two or three Witnesses be enough, if lyable to no Exception: Any *one* Person may invent or contrive any Story for Malice or Envy, or other End, to take away another's Life, *&c.* And who can disprove or detect him? But it's not so easie for *two*

to

to do it; yet *two* may possibly also agree and contrive an Evidence together, and so form it, and frame Circumstances, all agreed of before-hand between them, that being false, it may yet seem very plausible: *The Children of this World be wiser than the Children of Light.* *Jezebel* had *two* Witnesses against *Naboth*; and two Witnesses were against Chaste *Susanna*, to prove her Avoutry, yet both had false Evidence against them. *Susanna* was acquitted, only because the Witnesses differed what Tree it was under. In all Tryals whatsoever in *England*, either at Civil Law, or Common Law, where is no *Jury*, there all will confess must be *two* Witnesses at least, *Co. L. 6.* [b] And always that Witnesses are to be joyned to the *Jury*, they must be two at least, *ibid.* And in any Law any where must be always *two* Witnesses at least, and no place can be pretended of otherwise, except *only England.* And that it should be so *here*, even when there is a *Jury* too, see 48 *Ass.* 5. *Barree* 241. *Enquest.* 42. *Bract. l.* 5. 400. 48 *E.* 3. 30. And so is expressly *Mir.* 6. 3.

c. 3. &c. *Forteſc.* 73. *Co. L.* 6. *Inſt.* 3. 26. And ſo it was agreed in *B. C. Trin.* 9. *El.* And the only Reaſon why it ſhould be otherwiſe, is as aforeſaid, that the *Jury* be preſumed to know themſelves, to the Value of one Witneſs more. But if it ſo fall out, that really they know nothing themſelves; then, ſhould they find one Guilty upon a ſingle Teſtimony, they make that Law, which otherwiſe could not be Law, and find one Guilty the Law would have acquitted; and thus a Tryal by a Jury would be leſs ſafe and more deſtructive than any other in all the whole World again. The Jury thus make *one* Witneſs as good as a *thouſand*; for had a thouſand Witneſſed, the Jury could have done no more. This would occaſion great Miſchiefs, Perjuries, and other Inconveniencies. *A.* then being ſufficiently Malicious or Intereſted, and ſo deſigning *B*'s. Death, an *Italian* would *Poyſon*, *Spaniard Stab*, *French-man Piſtol* him; but being an *Engliſh-man*, and expecting ſuch a Credulous, Officious *Jury*, as aforeſaid, to help him, will ſure chooſe to

ſwear

ſwear him to Death; for *A.* has his Malice better anſwer'd. *B.* thus not only loſes his Life, but alſo his Credit, Eſtate, and what not? Beſides attainting his Blood, and utterly diſgracing all his Relations; and at laſt, how ſhall *A.* be diſcovered in it? He is infinitely more ſafe this way than any other. Or, ſuppoſe one comes out of the Moon, and by chance ſhould diſcover him, he knows he is ſafe of his Life, he ſhall not dye by our Law: If any body happen too that will be at the Trouble, Charges, Hazard, and Danger, to Proſecute him never ſo ſeverely. But by the Statute he ſhall forfeit 40 *l.* or at his Election ſtand a while on the Pillory, and half a year be in Priſon; this is all. Likewiſe a cunning Rogue, ſuppoſe, Robs one, *&c.* no Witneis by; if one offer to proſecute him, let him Proſecute firſt, and he Hangs one *thus* into the Bargain, and ſaves himſelf honourably. Or were there one or two Witneſſes by, but he firſt Proſecutes, and Swears againſt all; it will go hard with them all.

It's ſaid of the *Egyptians*, they had

no

no punishment for lying, and so had no measure in it; But [illegible] as well as *scarce* [illegible]. A Jury, though have two or more Witnesses, ought also consider and examine their Circumstances. Amongst the *Turks* only such may be Witnesses as are Freemen, can say their Prayers, have some knowledge in Law, be known of civil life and conversation, *&c. Busbequius Epist.* 19. By the Laws of *Scotland* (for the most part always like ours) none shall be Witness under 14 Years old; furious people, officer of the same Court, Women, Adultrous Persons, Thieves, Poor, whipt for any Offence, Infamous, Convict and Ransomed from Justice, Kinsfolks, Companions or Parties of the same Crime, Clergy against Laity; nor any ones Tenant, Bayliff, Servant, or any other of his Robe, Counsel, Retinue, *&c.* nor any known Adversary, nor any Person Excommunicate, or Imprisoned for, or accused of a Crime. *St.* 2. *Rob.* 1. By *our* Laws none ought to be a Witness that's Indicted of Treason or Felony, and not acquitted, Persons excommunicate

municate, outlawed, or otherwise defe-med, nor Judges in any case where they shall be concerned as Judges, *Brit.* 39. *Mir.* 117. 108. *Bract.* 118, 119, 193, 141. Persons outlawed or otherwise infamous, 11 *H.* 7. *Tonng* 116. *Stanf.* 88. 11 *H.* 4. 35. *Inst.* 3. 36. And certainly they cann't that be infamous, as attainted of a false Verdict, of any Conspiracy at King's suit, of Perjury, of a Præmunire, of Forgery on the *Stat.* 5 *El. c.* 14. of Felony, or have by Judgment lost their Ears, or stood on the Pillory, or be Infidels, or *Non sane memoriæ*, of insufficient discretion, considerably interested in the matter, *Cromp.* 127. b *Co. L.* 6. b A Husband or Wife cann't be Witness for, or against one another, *Co. L.* 6. b nor against any other in the same cause, *Stanf.* 26. b Except in criminal cases, where he or she is the Party offended, and swears only for the King, and no other Evidence can be expected. The Confession of a Criminal gotten by Fright, or any Artifice used upon him, or made before comes to his Tryal, is no Evidence against him.

The

The Common Law was so strong in this point, that 'till 2, 3, *P. & M. c.* 10. no Justice of Peace could examine a Criminal; in short,

Conditio, sexus, ætas, discretio, fama,
Et fortuna, fides in testibus ipse requires.

Ask his Estate, Fame and Religion,
Quality, Sex, Age and Discretion.

But the Judges use to Determine *who* shall be sworn, and *what* shall be produced *as Evidence* to the Jury, and the *Jury* what *Credit or Authority* the same's worthy of, *Co. L.* 6. [b] One that's burnt in the Hand for Felony, is by some held to be a Witness in Law; for, the Crime say they, is purged, so if pardoned by the King. And some hold many of those aforesaid are in Law good Witnesses, as *Poor* Men; but the Jury may consider such may easier be byassed or corrupted, he has not so much to lose or forfeit for a Crime, he lies under several Necessities and Temptations a Rich Man does not, *&c.* In *Solomon's* (Proverbs)

c. 30. praying against Poverty, the Reason's alledged, *lest being poor, one should steal, and take the Name of the Lord in vain.* And it's for something the Poet says,

Quantum quisq; suâ nummorum servat in arcâ,
Tantum habet & Fidei——.——.——
Juvenal.

As for *Servants, &c.* they are under the same Circumstances commonly of *Poor Men*, and worse, for more apt to do any thing in Obedience, or Favour, or else out of Malice, *&c.* against or for their Lord, *&c.* Before the Conquest the Oath of a *Thane* (one of like degree then, as a Yeoman is now) was in Law Equivalent to the Oath of six *Villains, Pagans*, &c. (Servants that were bound) *Lamb.* 56. 200. as for Persons any wise *Infamous*, such will not value or stand upon their Credit, or but the less, since have little or none to lose, *and over shoes over boots.* As for criminal Persons, It's a Maxime, *Justitia*

non

non poteſt cum ſcelerato Commercium habere. He that has been once wicked, or in one thing, may be ſuſpected again, or in another thing, hence where a Defendant is ſuppoſed in Law guilty but of a Contempt, Treſpaſs, Deceit or Injury; He ſhall not wage his Law, for the Law will not believe *him*, though would believe another againſt *whom* i an Action of Debt, Detinue or Account *Co. L.* 295. As for one under 14 Year old, ſuch are, as our Law ſays, not arrived at Diſcretion, ſuch may Miſtake, be Influenced, *&c.* and ſo of all the reſt. But it were not amiſs, If Juries heard all Perſons, weighing their Teſtimony as ought. A Jury ſhould miſlike any Witneſs alſo, that in's Evidence varies, delivers himſelf in any paſſion, ſpeaks at random, or not cautiouſly, or ſeems to ſide with or againſt either Party, or to argue, or to offer proving Negatives. None can ſwear a Negative, nor may be admitted to give Teſtimony directly againſt an Affirmative, 48 *E.* 3. 30. 12 *H.* 6. 6. *Aſſize* 408. 12 *H.* 4. 9. 50. *E.* 3. 16. 43 *E.* 3. 32. *Flet* li. 6.

li. 6. c. FNB. 136. h. 97. c. A Jury may take Notice of particular Statutes, Patents, Judgments, and other Records given in Evidence, and may go againſt Eſtopels, Concluſions, &c. ſo it be according to the very truth; for they muſt ſpeak the Truth in all caſes, Co. 4. 53. It's much the Jury does not always examine Witneſſes *themſelves*. If he that examines them be corrupted, or any wiſe ill affect, he may eaſily miſlead the whole courſe of Evidence, he may countenance which ſide he will pleaſedly, hearing the one ſide on one ſort, but the other not without brow-beating and uneaſineſs; he may frighten, diſcountenance, divert, puzzle, diſtract, or otherwiſe abuſe a Witneſs; he may flatter, wheadle, prompt, ask leading Queſtions, direct, &c. and thus darken and perplex the Truth.

How does a Jury diſcharge its Conſcience thus? The Jury is the only Judges alſo of what is ſaid, and how the Verdict ſhall be given, and they whoſe Conſciences are to be ſatisfied, and certainly know beſt what they want to know, &c. unleſs walk by implicite Faith, and there-

therefore be the moſt proper to ask the Queſtions.

All that is aforeſaid ſhould alſo the rather be as propoſed, conſidering how the Law is now alter'd as to Accuſers, Judges, Witneſſes, Councellors, Solicitors, &c. Anciently, *Omnis qui crimen objicit ſcribat ſe probaturum. Et non oportet quenquam Judicari vel Damnari priusquam legitimos Accuſatores habeat preſentes*, Ll. Guil. 1. c. 5. All Perſons that Indicted any other, were to be ſufficient, reſponſible, &c. *Co.* 5. 120. Accuſers gave Security to anſwer Damages if the Accuſation proved falſe, *Mir.* 19, 120, 124, 147, 195. *Glanv.* 75. *longum carceris inducunt incluſionem cum redemptionis, falſæ appellationes & hujusmodi abettatores*, *Fleta* 142. Fines were ſet on Appellours, 11 *R.* 2. Fines 2. 15 *E.* 3. Fines 49. 107. If *A.* brought an Appeal in any Caſe, and was either barred, non-ſuited, or his Writ abated, he was fined and impriſoned *immediately, without Defendants trouble*, 8 *H.* 4. 17. 20. *Brit.* 245. 32. *Aſſ.* 9. 42. *E.* 3. 26. *Appellee* acquit, the *Appellour* was by the ſame

ame Judgment, without more Trouble, mprison'd a Year and Day, and was to epair the Damages of Credit, Trouble, Charges, &c. of *Appellee*, besides, undergo a grievous Ransom or Fine to the King; and so was it of Abettors or Encouragers of the Prosecution, *Flet.* 53. It was Death to appeal innocent Persons of any Mortal Crime, 'till *H.* 1. brought it to Corporal Punishment, and satisfying the Party grieved his Damages, *Mir.* 250, 251. So the Lawyers were punished for assisting the Accuser, and a year and a day's Imprisonment inflicted on a Sergeant, Lawyer, Attorney, or Clerk, to use Deceit or Collusion in a Court, or consent to it, either in Favour of the Court, or any Person else, *Flet.* 57. Councellors were to be suspended Practise, if tendered false Delays, false Witnesses knowingly, used Deceits, Fictions, or Untruths to the Court: And were to swear not to maintain or defend any Wrong or Fallity, *Mir.* 121, 122. And it's by a kind construction they be not yet lyable in several Cases to be punished as Barrettors, Maintainers, &c.

An

An Assize did lye against Councellors, Attorneys, &c. by whose ill practice or means any one lost but a Free-hold in Land, *Mir.* 154. 299. *Brit.* 215. So Witnesses have formerly been punished severely. In the Scripture, the Story of *Susanna*, the Witnesses are put to Death. By *Moses's* Law it was Eye for Eye, and Tooth for Tooth, Life for Life, &c. against false Witnesses, *Deut.* 19, 21. By the Law, *Cornelia* amongst the *Romans*, a Witness that occasioned another's Death by false Testimony, lost his Head, if one of the greater Quality, else he was Hanged on the Cross, or given to wild Beasts, *Simler.* Before the Conquest, that of *Moses* was mostly; so with *us*, only sometimes it was Banishment, &c. *Ll. Ed.* c. 3. *Ethelst.* c. 10. 25. *Edm.* c. 6. 35, &c. *Edw. & Grn.* c. 11. *Aussi sont homicides de-volunt juges & tesmonis que fausses. Mir.* 34, 36. False Judges, and false Witnesses are guilty of wilfully killing Men. After it came to cutting out of Tongues, *Mir.* c. 4. *Ll. Canut.* c. 15. As for Judges, they were accounted Disseissours, if

wronged any one in his Title, *Brit.* 17. *Mir.* 154. 209. *Brit.* 315. In Scotland, *Judex qui ter male judicasse convictus fuerit perdit Officium & sit infamis*, *Stat. Rob.* 1. *c.* 28. A Judge convicted of having thrice ill judged, loses his Office, and is adjudged infamous. Says *Glanvil*, *Tenetur Curia Judicium suum tueri per duellum & maxime per illum qui Judicium reddidit. Et quidem si Curia de falso Judicio convicta fuerit, Dominus Curiæ in misericordiâ Regis manet & perpetuò Curiam amittit; præterea tota Curia in misericordiæ Regis remanet*, Glanv. 66. *Altresi qui faus jugement fuit pert sa Were si il ne pret prover sor saintz que melz ne poet juger*, *Lamb.* 162, 64. Also whosoever gives a false Judgment, shall forfeit his *Were*, (what's Life is worth) unless can prove on Oath he could judge no better. Judges, if Condemned one to Death against their Knowledge, or by Ignorance of, or in what they ought not, as Judges, be Ignorant of, they be Murderers, *&c.* and to dye as such, *Mir.* 256. *v. Bract.* 412, King *Alfred*'s Law was, That false Judges, be-

becauſe diſhonour *God*, whoſe Vicars they be, (the Scripture calls them Gods) and the *King*, which raiſes them to ſuch an Honourable Seat, as the Chair of God; they ſhall (firſt) make ſatisfaction to the Party grieved, forfeit what elſe they have, and ſuffer further Puniſhment at King's Will and Pleaſure. And if they falſly put to Death any, then to dye themſelves, and always at leaſt to ſuffer like for like, *Mir.* 265. 301. Appeal of one's Death lay againſt a Judge, for judging one falſly or wrongfully to Death, *Mir.* 136, 258, 298. Preſentments were made againſt Chancellours, Judges, *&c.* for breaking their Oath, *Mir.* 144. There were 44 Judges hanged in one Year for wrongful Judgments, *Mir.* 296. *&c.* And ſays the ſame Book, it's an abuſe, that all things are not ſo now, 296. What became of *Treſilian* and *Belknap*, of later years? But now the Law ſeems clear otherwiſe, we have little or no Puniſhment againſt Chancellours, Judges, Councellors, Attornies, Clerks, Witneſſes, *&c.* yet were Juries *then* ſo cautious, as aforeſaid, with and againſt them,

them, where now therefore how many times more Jealous and Cautious have they Reason, and should they be.

The Law considering the great Burthen that lies upon the Consciences of Jury-men, has favoured them with this Liberty. They may, as aforesaid, take upon them the knowledge of what the Law is in the matter, or upon the truth of the Fact, as well as the knowledge of the Fact, and so give in a Verdict generally, *that the Defendant is Guilty or not.* Or they may give in only the matter of Fact, particularly how they find it to be, and then leave it to the Judges to determine. Or, they may acquaint the Judges, how the matter of Fact stands, and then ask the Judges their Opinion as to the matter of Law, and then determine the whole matter themselves. The *Grand Jury* strikes out of the Indictment what they be not certain is true, or may any way alter it to what they be certain is true: Or if any thing be in it they be *doubtful of*, they may superscribe it *Ignoramus*, at their discretion in all these Cases. Thus if a Jury find the Words not spoke, or the Fact not done with, and according to the Aggravation

and Circumstances in an Indictment, &c. mentioned: They ought either *not find* the Indictment, (for one not being Guilty as the Indictment mentions, is consequently not Guilty of that Indictment, but rather seems, if guilty at all, guilty of some other matter than which he stands Indicted of, and so of some other Indictment only; and then let the Prosecutor, if so fond of troubling his Neighbours, bring such other) Or *strike out* what they have not sufficient Evidence of, as do often in Indictments of Murder, (which say the Defendant *of his* [illegible] *fore-thought Feloniously Killed and Murdered* such a one) strike out the words *of his malice fore-thought* and *murdered*, having no Evidence of the Malice, but sufficient of the rest, and then endorse it *Billa vera*, and so find the Bill *Man-slaughter*, instead of *Murder*. So was it of an Indictment against Ld. *Cornwallis* and Count *Arundel* his second in a Duel. In like manner, when the Evidence proves a Fact done only by mischance, defending one's self, in time and place of War, when Defendant was *non Compos mentis*, an Officer doing his Office, &c. the *Grand Jury* alter the Indictment,

ment accordingly. So of the *Petit Jury*, only it does not alter the Indictment, *&c.* but instead of altering Murder to Man-slaughter, *&c.* as aforesaid, in the Indictment, they only say, Guilty of Man-slaughter, and not of Murder; or guilty of Chance-medley, *Se Defendendo*, *&c.* but they may tell the Court particularly and plainly how they find the truth in, and the whole matter to be so far as concerns the Fact, or what was done or said. As in Cases of Words, what were spoken, where, to what intent, *&c.* and so leave it to the Court to judge on it according to Law, and to tell what the Law is thereupon, and so be discharged themselves, which is called giving a *special* Verdict. Suppose *A.* brings an Action of Debt on a Bond against *B.* as Heir of *C.* and *B.* pleads he hath nothing from *C.* to pay any thing with; and *A.* replies that he has, *&c.* and so the Issue is joyned (or what the Jury be to Try, is) whether he has any thing, as aforesaid, or not. *A.* proves that *B.* had before the Action brought something so, but aliened by Fraud and ill Practice, to deceive *A.* of his Debt. Now they finding the matter or case to be thus indeed, and the Law being (for there is a

Statute, 13 *El.*) that such aliening shall be void, and consequent, the Heir chargeable nevertheless: They may, if will, as aforesaid, either take upon them to know the Law, and in this, or any Case, say *generally*, they find for *A*. Or not take Notice of the Law, but *only* of the *Matter*, and so tell the Court how, and what they find the matter to be; and thus leave it to the Court to judge in Law, whether ought to be found for, and this is their most safe way. To this end was the *Stat. of Wes.* 2. c. 3. that if a Jury doubt on the Evidence what the Law is, and therefore what to do, they might leave it to the Judges to determine. But, says *Coke*, this Statute is only in *affirmance of the Common Law*, *Inst.* 2. 425. 13 *E.* 1. 39. See a *special* Verdict in Case of *Murder*, *Co.* 4. 44. *Co.* 9. 63. One in an *Information*, *N. B. Ent.* 373, 378. *Co.* 1. 22. One in *Attainty*, *Ly.* 173. So in a Case about *Murder*, the Jury tell the Court, they find the Killing itself to be true, but not the Killing Feloniously, as mentioned in the Indictment, and so ask the Opinion of the Court if it be Murder, *Co.* 9. 69. So the Jury found the Parties Indicted for *Riotously* tearing the Petition, Guilty of tearing the Petition

tition, but not of the *Riot*, &c. It's true, it's doubted in *Moor*, c. 1002. whether in a Writ of Right a Jury may give a special Verdict. But as there is no Reason, that if the Cause be indifferently plain, as to the Law, the Jury themselves should not put an end to it, giving a *General* Verdict, as Guilty or not Guilty, &c. without so much further Charge, loss of Time, increase of Trouble, as otherwise must needs follow; yet on the other hand, there is as little why, if there be difficulty in Law upon the case, that they being mostly unlearned in Law, should be bound to find *generally* Guilty or not, &c. and so find and say on a sudden what is the very Law, as well as Fact, when some such Cases have several years pursue all the Judges to resolve. And it's against no Reason, that the Election of giving a special Verdict, or general Verdict, should be in the Judges too; for the Jury best knowing themselves, their own Capacities and Strength, do therefore best know when meet with difficulties to them in Law, and so when [illegible] the one or other: And accordingly [illegible] best Opinions that the Jury may [illegible] the Action, &c. real, personal, or mixt, [illegible]

vil, Criminal, Publick, or Private; and be the Issue general or special, or in any Case whatsoever: And that the Judges must accept of, and can't refuse such Verdict, 13 *E.* 1. 30. *Fitz. J. of P.* 114. *Co.* 9. 14. *Inst.* 2. 425. *Inst.* 4. *Co. L.* 227, 228.

Either Jury may at any time alter their Opinion or Verdict, &c. before Recorded in Court, *Fitz. J. of P.* 114. *Co. L.* 227.

All said any where above of *Grand Juries*, may be applied to the *other* Juries; and the Body will offer to deny, but *other* Juries ought to be as strict, circumspect, and careful, &c. as aforesaid, though would pretend otherwise of *Grand Juries*.

A *Petit Jury* may abridge a fault a *Grand* Jury finds one Guilty of, but can't enlarge it: As one indicted of *Murder*, may by the *Petit Jury*, be found Guilty of *Man-slaughter*, *Chance-medley*, &c. instead thereof; but one being Indicted of *Man-slaughter*, can't by the *Petit Jury* be found guilty of *Murder*, or any *greater* Crime than *Man-slaughter*.

A *Petit Jury* can't give any Verdict against any one, where Life or Member is in question or danger, but only in the Court, whilst also it's sitting, &c. though in other Cases may.

A

A Letter to the Author.

SIR,

HAving by your Friend received your Treatise concerning Journies, with desire that I should shew it to one, whose course of Study is so well known to be Conversant with Ancient Records and Books, as his Judgment is worthily Esteemed, I did, after I had read it over, perform that Trust, by shewing it to that Learned Gentleman, whose Opinion your Friend told me was desired; and further that Gentleman, it was Communicated to another Worthy Person of the same Course of Study; and both of them having read it over, I from them return it to you, with Assurance, that they, as well as I, have had much Satisfaction and Delight by reading so useful Subject Matter so Learnedly Treated of, in a time, when this Publishing it seems *not only Seasonable, but Necessary*. I wish we might have the Happiness

know you, but being assured by your Friend, that you have taken a Resolution as yet to Conceal your Name, we must for the present, think it enough to believe that Treatise is composed by a *Worthy*, as we find it could be done by no other than a *Learned Man*.

And I must, in returning your *Manuscript*, present you some Matters and Cases which occurred to our Thoughts in Reading it, which being agreeable with yours upon that Subject, yet some of those Cases and Instances, I am about to mention, not being so particularly Expressed in your Book, though two or three Passages which are in yours. [as concerning all the Twelve of a *Jury* of Tryal to consent in Verdict; and in *Grand Juries*, Twelve at the least to consent in making Presentments, or Indictments; and the Matters of *Empson* and *Dudley*,] I shall herein repeat, because they will relate to the other Paragraphs I have intended, what may seem not mentioned in yours, are offered to you to consider, whether you will insert them in some proper Places among the Leaves, and Chapters of your Book, and reject the rest that

That I shall Write in these Papers, unless you please to receive them all together as they will be sent to you, by way of Letters, which yet must want the Ceremonial Forms of Address, whil'st you forbear to let me know, to whom to direct my Respects.

What I am about to present to you, relating to this Matter, are:

Let any Sober Citizen consider, how Legal, Just, and Reasonable, he would think it, if being of clear Reputation, Credit, and Innocency, he should be indicted for some Base, yet Capital Crime, upon the Oath of a *stranger* or *bad Fellow* Evidence, who should be altogether unknown to the *Grand Jury*, or Malefactor suspected to be a *Rascal*, notwithstanding which they should (by the Instructions) find the Bill, and thereupon the Citizen should be publickly arrested by Officers, haled from his House or Shop, committed to Prison, [illegible] carried, and [illegible] to prevent pretended [illegible] his Credit and Reputation [illegible] without Remedy. [illegible] it should be found, the *Grand*

to find the Bill, from whence all these sad and woful Consequences follow'd, *upon such late applauded Notions, that the* Grand Jury *are not to be Judges of the Credibility of the Evidence; or that the Citizen is not in danger of his Life, till his Tryal by another* Jury.

Again; How much would such Principles have been abhorred, and declaimed against, if a Woman, notorious for being a Common Whore, should have indicted the late Archbishop of *Canterbury* for a Rape, and the *Grand Jury* should have found the Bill, whereupon the Archbishop was to be committed to Prison, suspended from Ecclesiastical Jurisdiction, his Goods and Chattels all over *England* inventoried by the Sheriffs? Would the Plea have excused the *Grand Jury*, in the Opinion of any Unbiassed and Impartial Man, that though they believed in their Conscience, that the [illegible] Woman swore false, yet, they being to find accordingly to her positive Evidence, they, as to many Parish-Clerks [illegible] but to say *Amen* to her [illegible] of the Fact, and so find *Billa vera* [illegible] Prelate?

It

It may be also considered, whether the Statute 13 *Car.* 2. *cap.* 1. which requires that Persons shall be Indicted and Accused by the Testimony and Depositions of *Two Lawful and Credible Witnesses upon Oath, can be interpreted to make the Testimony of Two Witnesses not Credible, sufficient Evidence?* If the Witnesses are to be Credible, as the Statute plainly declares they ought to be, then it may be further ask'd, Who are to be Judges thereof? If the Judges; Then they take upon them to determine *Matter of Fact*, and to become Judges both of Law and Fact: And what need then is there of *Grand Juries?* But that the Credibility of the Witnesses, as well as the Circumstances of the Evidence of the Witnesses is entirely left to the Grand Jury, is plain from this; That if one of the Judges be [illegible] must in that respect [illegible] his place as a Judge [illegible] appear before the Grand Jury [illegible] other ordinary Witness.

Besides, if the [illegible] Evidence had not [illegible] if [illegible] they

they should refuse to find according to the direct Swearing of the Witnesses, (whether true or false, probable or improbable to them,) and if they should not implicitly follow the Pleasure and Direction of the Judges.

But that the Jury *is not finable, is adjudged in the Case you remember of* Bushel, *in the Lord* Vaughan's *Reports, by solemn and seasonable Resolution of the Judges.*

And should not the *Grand Jury* be Judges of the credibility of the Evidence before them, the *Affidavits* of Two Persons, who should swear Treasonable Words against any Man, would be sufficient to bring him immediately upon the *Jury of Life and Death*, and then the Trouble of a *Grand Jury* would seem only a piece of needless Formality, which our wise Ancestors never thought so slightly of before; and certainly the Use of them would never have been continued, [illegible] would Men of so Great Worth, as they generally are, or should be, serve the [illegible]; where Sheriffs make a Conscience of their Duty to return such.

It [illegible] Impertinent here, to [illegible] or Credible Report, of

of what happened in the Reign of Queen *Elizabeth*, concerning a Jury at a Tryal, whereof the Substance is; That a Murder being committed, a Man, who was suspected for the Fact, was Arraigned before the Lord Chief Justice *Anderson*, at the Assizes; the Evidence was so strong, that the Judge directed the Jury to find the Prisoner Guilty; and they going together to consult of their Verdict, Eleven were for finding him Guilty, but the Twelfth Man was against it: This began great Dispute, and the Judge expecting a present Verdict, sent for them to know the Reason why they staid so long: He being ready to rise, the Jury told him, they were all agreed but one, whereupon the Judge asked him, why he did not agree with his Fellows, to find the Prisoner guilty, seeing there was so plain and full Evidence? To this the twelfth Man gave no Answer, [illegible] *of the Jury are bound to declare their Reasons for their Opinion.*) So the Jury was sent out again; but no Perswasions could prevail with the twelfth Man to agree with the rest. Therefore the Jury [illegible]

shut up all Night without Meat or Drink, and in the Morning great were the Complaints from the Eleven, of the Indisposition of their Health; so that the Judges in Commission sent for them, and they agreeing with the Twelfth Man, the Prisoner was found Not guilty, and so acquitted. After the Jury had given in their Verdict, the Chief Justice desired to speak with the twelfth man, and that he should come to his Lodgings after the Court should rise: When he came, his Lordship taking him aside, told him, that the Country look'd on him as an Honest Man, but in what he had done [illegible] much [illegible] there was something extraordinary, and desired him to tell him what it was? The Juror, with a disturbed Mind, told him, that if it might not turn to his Prejudice, he would discover the whole Business: To which the Chief Justice replyed, that it should not, and gave him his Word upon it; whereupon the Juror with tears told him, that he was the Person that had unfortunately killed the Man, and that the Prisoner was not guilty of it; and that this Juror had not [illegible] to serve in the Jury; and confessed,

that

that after he was sworn, *upon his Lordships Directions, and the Juries Importunities, he had once resolved to comply, and find the Prisoner guilty*; but when he considered, that was to add Perjury, and another Murder unto Murder, he resolved to be starved to Death, rather than to agree thereunto. When the Chief Justice had heard his Case, you have, [illegible] done [illegible] ill thing; but seeing you have not added one crying sin to another, Pray God for Pardon, and I will [illegible] the Queens Pardon.

Sir, You having mentioned in your Book, I might omit to say any thing, that Juries of Tryal every one of the twelve must agree, or no Verdict can be given, and no way should be introduced to go to the Vote, and Poll amongst themselves for the major part. But I could not forbear mentioning it again, because special Notice should be taken thereof.

And also of what you have very well observed, that Grand Juries [illegible] not *to find any Bill, or make any Presentment or Indictment, unless twelve of their number agree to the Presentment or Indictment*. The Rule of Law being very clear [illegible]

[illegible]

may appear by the Statute that direct Enquiry to be by the Oath of twelve Men; and all the said Statutes prove, and some of them expresly declare, that Enquiry by the Oath of twelve Men hath always been the laudable Custom and Usage of this Realm. Therefore though Grand Juries consist of a greater Number, and may put matters of Fact before them to the Vote and Poll, yet the major part of them ought to be twelve at the least, to agree to any Bill of Presentment or Indictment: for there cannot lawfully be any Presentment or Indictment, unless twelve of them consent thereto, which I could not forbear the more expresly to repeat; *It being fit and necessary for all Gentlemen, and others who serve in Grand Juries to know,* to prevent Mistakes of what is so plain, the Law in all Cases of Presentment and Indictment by *Grand Juries.*

That *Juries* are Judges not only of Fact, but of Law, by your Treatise may more fully be seen, and may clearly appear by their Power to give Special Verdicts as well in Criminal as Common Matters, as in the Case of Bushel, &c.

may find only the Felony, and acquit of the Burglary, and many such like Cases, as where Indictment for stealing Goods therein mentioned, of the Value of Ten Pounds, they may find the same to be but Ten Pence, and so to be but *Petit Larceny*.

And I hope it will not seem tedious to shew that *Juries*, as well of *Inquiry* as *Tryal*, have sometimes been Judges also in Matters of the Church and Religion, even in time of *Popery*.

As in Cases of *Præmunire*, such anciently was the Care and Watchfulness, which our Law provided against the Danger and Incroaching Jurisdiction of the *Popes* and *Church of Rome*, which have always had Designs against *England*, *our Laws and theirs being incompatible*.

Therefore from the time of King *Edward* the Third, and the Reigns of the succeeding Kings, there have been Laws made, That *if any of the Kings Subjects obtain Provision or Promotion to Benefices, or if any Appeal from the Kings Courts of Justice to the Court of Rome, &c. they shall be Imprisoned during Life, and forfeit their Lands and Goods, and be out of the Kings Protection.*

on. And we know, that the way of Inquiry and Tryal in these Cases hath always been by *Juries*.

There are some other Matters comprised within the Construction of the Statute of *Præmunire*, as the drawing Matters any where else to another Examination than in the King's Courts of Law. And many other Offences made to be under the like Punishment, and call'd *Præmunire* by other Statutes, which we need not here mention; my Intention being only hereby to shew, that *Juries* have been anciently Judges of *Ecclesiastical Matters*, even in time of *Popery*.

And for their having been Judges of Religion also, we may see after King *Henry* the Eighth had cast off the *Pope*'s usurped Supremacy, and by the Power of a Parliament restored the Crown and Laws of *England* in Church Matters, to their ancient Rights and Usage, but had not then cast off the *Popish Religion*; He, with the Lords Spiritual and Temporal, and the Commons in Parliament, in the Thirty first Year of his Reign, even at the Instigation of the Clergy, (as is recited in the Record of that Statute, and in *Rastall*'s Printed Book

Book of Statutes at large, 31 *H.* 8. *c.* 14.) Enacted that the Statute (commonly call'd) of six Articles; whereby,

1. The Real Presence in the Sacrament was to be believed.

2. That the Communion in both kinds was not necessary.

3. That Priests ought not to Marry.

4. That Vows of Single Life are to be kept.

5. That Private Masses were agreeable to God's Word.

6. That Auricular Confession was necessary, and that if any one should Publish, Declare, Say, Affirm, Argue or Hold any Opinion against the said Articles, he should suffer Pains of Death, without Benefit of Clergy, and forfeit all his Estate, Real and Personal, and Commissions were to be directed to the Bishops of the Dioceſs, their Chancellors, Commissaries, and other Persons, as the King should appoint, to *Inquire by the Oaths of Twelve Men concerning these Matters.*

Of which Statute, the Learned Dr. *Burnet* in his *History of Reformation*, Folio 266. hath observed, "That there was but "one

"one Comfort which the poor Reformers
"could pick out of the whole Act, *That*
"*they were not left to the Mercy of the Cler-*
"*gy in their Ecclesiastical Courts, but were*
"*to be Tryed by a Jury, where they might ex-*
"*pect more Candid and Gentle Dealing.*"

But though these Matters were thereby to be brought before a *Jury*, yet so great were the Arts and Industry of the Bishops, and those who were then most Zealous to uphold *Popery*, that they endeavour'd sometimes to bring back these things to their way of Determining without, and to lay aside *Juries*, and often when these Matters were brought before *Juries*, they did overawe them, and overstrained this Law, and so dreadful were the Storms, and so grievous the Persecutions against the then Dissenters, that in the 35*th.* Year of the same Kings Reign, to qualifie the Severity, (as by the Record thereof, and *Rastal*'s Book of Printed Statutes at large, 35 *H.* 8. *cap.* 5. may be seen) that whereas by force of the former Statute of 31 *H.* 8. *Certain false Accusations and Presentments were brought against the Kings Subjects, and such Accusations and Presentments were kept secret from*

the

the knowledge of the Accused, till time espyed, and they by Malice Convict, to the great Peril and Danger of the Subject. It was therefore Enacted, that Presentments and Indictments on the said Statute, whereunto any Person shall be call'd to answer, *shall be in open Court, upon the Oaths of Twelve indifferent persons, according to Equity and good Conscience, and as other Presentments have been used to be taken in this Realm in such [illegible] Causes, according to the good and [illegible] Custom and Usage of the same. And [illegible] the Inquiry and Tryals upon the said Presentments and Indictments, may justly and Charitably proceed without Corruption or Malice accordingly.*

If any Object against this last recited Act, That the Statute of 31 *H.* 8. of the six Articles, was afterwards, in the time of King *Edward* the Sixth, Repealed, and that this latter Statute of 35 *H.* 8. is also Repealed, or of none Effect. It is to be answered, That though the first be repealed, and that the latter Statute, in what it relates to the former Statute in that respect be Repealed, or of no Use, yet as to what *it doth Declare and Affirm to be the Ancient*

and

and long used Course of Law, that Juries should proceed according to the Laudable Custom and Usage of this Realm, and agreeable to good Conscience and Equity, and Charity, without Malice or Corruption, and that the Lives of the Subjects ought not to be drawn into danger by False and Malicious Accusations, and Secret or Corrupt Practices.

These are such *Fundamental Maxims* and Rules of Law, as cannot be repealed and no Judges whatsoever may give any Expositions to the contrary, any more than they can do against *Magna Charta*, or any other Fundamental Maxims or Rules of our Laws and Government.

Thus you may see, what was then declared by the *greatest Authority on Earth, the King, Lords and Commons in Parliament*, that the Laudable Custom and Usage of this Realm, hath ever been for *Grand Juries* to make their Presentments and Indictments according to good Conscience and Equity, and *that they ought to proceed therein, as well Charitably as Justly.*

Since therefore in such Matters as belong to Grand Juries to enquire, or are brought before them, they have as large Power as

a Lord Chancellour hath, in matters with-
n his Cognisance. Well might Antiquity
all them Grand Juries, as *Magna Charta*
s called the Great Charer, from its great
nd weighty Contents.

Here I would not have it thought a Di-
greſſion to add, that having ſeemed before
o ſpeak only of Grand Juries, and Juries
f Tryal in Criminal Cauſes, that the like
ules are to be obſerved concerning Juries
Tryal of Actions between Party and Par-
, that the Judge ſhould always leave the
atter impartially and fairly before them,
hich would much diminiſh the number of
ivial Actions, as of ſlander for Words,
c. whereof there may be ſome doubt,
hether ſome of them would bear an Acti-
the Judge would be pleaſed at the Try-
not to countenance either Party; where
great Man ſometimes will bring Actio
gainſt a meaner or poor man, for Words
ay be but ſlightly proved, though by
Witneſſes of ſeeming Gravity, and not give
Directions thereupon, to give exceſſive
Damages by reaſon of the great Quality of
the Plaintiff.

I ſhall further take leave to Obſerve, that

both

both Juries of Inquiry, and Juries of Tryal, with their Power and Priviledges, are so naturally the Rights of *English-men*, that even when strong Endeavours were used to lay them aside by an Act of Parliament, which *Empson* and *Dudley* (whom, though you mentioned in your Book, and I must take occasion to repeat with some Observation thereon) had procured in 11 *H.* 7. to proceed without [illegible]; yet when, like wicked Gardiners (for Gardiners may be a Simile for Connivers and [illegible] of Justice and Government, and be [illegible] good or bad as they behave themselves) the aforesaid *Empson* and *Dudley*, instead of using the Power they possest in their [illegible] favour, which should have been for preserving, had cut down some of those [illegible] Trees of wholesom Fruit, [the way of Inquiry and Tryal by Juries] and digged deep to bury them by the Act of Parliament they had obtained to that purpose, and hoped they would never rise again: Yet, *there being a lasting Life in our good old Laws*, (though sometimes as little to be discerned, as when the Life of Trees in Winter-time retires [illegible] to their Roots;)

Roots:) The Act of 11 *H.* 7. was repealed by an Act of Parliament, 1 *H.* 8. and the Use of Juries restored *and sprang up again*, to the Confusion and Destruction of those Treacherous Gardiners, of whom the History is Famous enough, to be a warning to all others to avoid the like mischief.

And how careful Judges have since been, and ought to be to maintain the Ancient and Rightful Course of Law, and not to go out of it, may be seen in *Anderson*'s Reports, *fol.* 156. where *Empson*'s Indictment is recited at large. That Act of Parliament by which he and *Dudley*, being as in the 94*th. Psalm*, ver. 20. like the seeking *to establish Mischief by a Law*, and so contrary to the good Fundamental Law of *England*, to Enquire and Try by Juries; *That though it was an Act of Parliament they acted by, it proved too weak to save their Heads*; and became Fatal to them who procured, and were chief Instruments in the Execution of it, and the inferiour Instruments, the Informers and Promoters, were also severely punished, and dyed shortly after, as mentioned by the History of King *Henry* the Eighth, Written by the Lord *Herbert*.

As an Appendix to the Treatise of Juries, might be also recommended to your Consideration, the late increase of *Informations in the Crown-Office of Court of the Kings Bench in Criminal Cases, not specially and particularly expresst or directed by any Statute*; for thereby the Subject is drawn into *hazard of Liberty and Estate*, without Presentment or Indictment of Grand Jury, and thereby deprived of that *great and good out-guard of his* Liberty and Property, the Inquest by Oath of twelve Men, before he should be brought to Tryal, which is worth the Judges Care to rectifie, or will be worthy the Consideration of a Parliament by a Law, more fully to remedy for the future.

By having after named *Empson* and *Dudley's* History, mentioned the Mischief, which if not carefully prevented, would grow by the Increase of the last mentioned Informations in the King's Bench, I do not in either of these Cases, intend any Reflection on any of the Judges; for as I am a Son of a Judge, who whilst he lived made it his Care to maintain, as well as use the Rules and due course of Law, and often, as well in publick

lick as private Diſcourſe, would praiſe the Excellency of our Laws, and particularly thoſe of Enquiry and Tryal by *Juries*; I bear ſuch Honourable Reſpect and Kindneſs to the preſent Judges, as to believe and hope, that whatſoever (may ſometimes happen) they always do, and will for the future, make it their Care to preſerve the Law in its due Courſe, and to prevent any Miſchief or Inconvenience from Entring or Growing in the Uſe or Practice of it.

I would here cloſe, but that I could not totally forbear to take ſome Notice of the Ways, which are uſed to puniſh thoſe *Proteſtants, who do not Conform in the Outward Manner of Worſhip and Ceremonies, though they agree with our* Engliſh Church *in the Main Doctrines thereof*, and in all reſpects behave themſelves *Peaceably*, whereof I crave leave freely to ſay my Mind.

That, though I love our Church, and frequently and duely receive the Sacrament, and I, and all my Family come conſtantly to Church every Sunday, (except hindred by Sickneſs, or other Extraordinary Impediment) and continue decently there during all the Time of Divine Service; and I

ſo well love the *Common-Prayers* thereof, that I uſe part of them in my Family; and would perſwade all I can to the like Conformity; yet I have that Kindneſs to all thoſe Proteſtants, commonly call'd *Diſſenters*, who by reaſon of *Tenderneſs of Conſcience, different Education, or Uſe of other manner of Worſhip, and who, though they differ in Opinion, concerning ſome leſſer Matters, yet hold the main Doctrine of Chriſtianity, wherein all Proteſtants agree*, notwithſtand their different manner of Worſhip.

And I could uſe many Arguments for *Gentleneſs* towards them; whereof I ſhall here only name the *Topicks* of ſome of them; which are,

From the common ſenſe of Humanity.

From Principles of Right Reaſon.

From Chriſtian Charity.

From Divine Command, and the Holy Scriptures.

From its being well pleaſing to God, and the Way to have his Bleſſing.

That the beginning of Perſecution of, and among Chriſtians, was from Antichriſtian Principles.

That Perſecution is chiefly uſed by the Pope *and* Church *of* Rome. *That*

That Union of Protestants is the Common Interest of the Protestant Religion, both here and abroad.

That Union of Protestants is the best way to preserve and defend us from the Idolatry, Policy, and Force of Popery.

That the safety of Christendom depends upon it.

That it is the best way to preserve the English *Monarchy*, so as thereby it would Ballance, and hinder the *French King* from gaining the *Universal Monarchy*, and be a means to preserve the Countries and Dominions of *all other Princes of Europe in* Safety.

That it would much encrease the Peopling of this Land by quiet dwelling here.

That it would infinitely inrich this Nation by increase of Trade, and Value of Land.

That Trade being thereby encreas'd, his Majesties Customs will be also very much encreas'd.

That Gentleness, Mercy and Kindness, are honourable Qualities.

That these Qualities are agreeable unto the Gracious Expressions of his Majesty, to his Protestants Subjects concerning the same.

That it is suitable to the Kindness he shews

to the Perſecuted French Proteſtants.

That we hope ſome of his Counſellors and our Beſt Magiſtrates, are of the like Honourable Mind, concerning Gentleneſs to be uſed to *Proteſtant Diſſenters*, and that the Meaſure of their Goodneſs, will be eſteem'd and taken by the Degrees of their Diſpoſition to ſuch Gentleneſs.

I could name more Particulars, from whence much might be ſaid on every of them to this purpoſe; which Task, though it would be rather pleaſant than difficult, I ſhall not meddle with, but leave it to ſome other, who will better perform it than I can, it being unneceſſary here to ſay more thereof, becauſe it is here only proper to Obſerve how ſome late Acts of Parliament, relating to Church Matters, leaving the Truſt of punithing thereby, to the Diſcretion of the Magiſtrates, without the uſe of *Juries* (which is ſo great a Truſt, as was not uſally left to any Judges in former Ages) thoſe who have that Power ought to be the more careful, diſcreetly and prudently to uſe it with Moderation, *and not to abuſe ſo great a Truſt by overſtraining ſuch Laws hunting after, and taking all Occaſions they*

can

can to punish their fellow Subjects with the utmost, or beyond the Rigor, and contrary to the Intention of those Laws.

And whereas one of the late Acts, allows an *Appeal*, it may yet seem hard for an *Englishman*, to be put to that *after-game* of a hopeless Tryal of his Appeal by a *Jury*, when he is deprived of his *first legal Guard*, a *Grand Jury*, to whom by the *Laudable and Ancient Usage of* England, *all Presentments and Indictments in Criminal Matters do belong*. And it is further to be considered, that the Person who is brought into this Trouble, may be under great Difficulties, whether to desire, or how to manage his Appeal, when, perhaps, *all his Goods*, by selling whereof he might provide Money to deposite, as the Law requires, before he can be admitted to Appeal, *are taken from him by Distress, and at last his Appeal shall be tryed before the same Justices*, that inflicted the Penalty on him, and also that the Prosecution at the Tryal shall be managed by the Informers, who are to be Sharers of the Profit, they can get by the poor Man's ruin.

These are some of the Considerations I could not omit to mention, togethes with my

my wish, that the good Reputation of our Ancient Laws, may not be clouded by any more such New Laws, as herein seem to imitate Ecclesiastical Courts, where Proceedings are without Juries, which it seems some of our Clergy in times past, did think to bring to pass, whereof, though I could mention some Instances, I shall only cite one fully to our purpose, out of the Lord *Cokes* 2d. part of *Institutes*, being his Exposition on some Statutes, *fol.* 599, &c. where he saith, *It will conduce much to the understanding of this matter, to report unto you what Articles Archbishop* Bancroft *exhibited in the Name of the Clergy, in* Michaelmas *Term*, 3 Jacobi, *to the Lords of the Council, against the Judges of the Realm, Entituled, Certain Articles of Abuses, which are desired to be reformed in granting Probibitions. And the Answers thereunto, upon mature Deliberation and Consideration, in* Easter *Term following by all the Judges and Barons of the Exchequer, with one unanimous consent under their Hands, Resolutions, which were by them delivered to the Lords of the Council, and for distinction-sake, because there might be occasion often to cite them, called, Articuli Cleri*, 3 Jacobi. These

These Articles, and their Answers being very long, I must refer to be there read, as being very material to be known, how the Clergy endeavoured to get the multitude of Businesses into their Courts, to be determined without Juries, and so encroach upon, and alter the Course therein, of our good *English* Laws and Government. At the end of those Articles and Answers, the same Author further saith,

That the Clergy claimed to Interpret all Statute-Laws, concerning the Clergy; but it was resolved by all the Judges of England, *That the Interpretation of Statutes concerning the Clergy, being a parcel of the Laws of the Realm, belong to the Judges of the Common Law.* And saith, *Magna est veritas & prævalet.* To which, as agreeing to the truth thereof, I may add, *Lex* Angliæ *optima est, & prævalebit.*

I would not have any of our present Clergy think I reflect on them, for I truly and heartily Honour, some of our Bishops and Dignified Clergy, and any others of them, whose soundness of Doctrine, great Learning, and good and sober Lives, are, and might be, Examples for all the rest, and for whose sake, I bear Civil Respect to the rest that

that are not altogether so praise worthy, as those Good and most Reverend Men, to whom I bear my chief Respects, but shall say no more of any of them here, but that I hope, they will leave off severe Punishing their fellow-Christians, *and forbear one another*, Col. 3. 13 *And study to be quiet, and meddle with their own Business*, 1 Thes. 4. 11. And that by a re-view of these Laws, these things will in due time receive prudent and gentle aswell as sufficient Cure and Remedy in Parliament.

And now, Sir, I hope you will pardon me, for having, perhaps, been too tedious, seeing your excellent Treatise contains so much on the behalf of Juries, that all that I can say, may seem needless; and you may think fit to lay aside what I have written; yet if it only have the effect, to dispose you to let us know, to whom we owe our Acknowledgments for your so good Book, which is fit for every *English-man*, who may think himself concerned in our Rights, to read and understand, I shall think it enough to testifie that among those you will infinitely Oblige thereby; I shall desire to be

Dec. 29. 1681. *Your Friend and Servant*, J. M.

John Maynard

I Shall here add a neceſſary Poſtſcript concerning 3 *H.* 7. *Cap.* 1. Wherein there is a Clauſe, how in ſome ſpecial Caſe, a Jury of Enquiry may be fined, *That it only concerns ſuch Matters and Offences, whereof Indictments may be brought before Juſtices of the Peace in their County Seſſions; if the matter plain and fully proved, and they wilfully conceal the ſame,* the ſaid Juſtices of the Peace might cauſe a new Inqueſt to be returned (but the words, *take Inqueſt*, do not give the Juſtices power to name, who ſhall be returned, *which is the Sheriffs Office*) and it is to be only and purpoſely to enquire of ſuch Concealment; and doth not extend to enquire of any other Offences whatſoever; and then after ſuch wilful Concealment is found by ſuch Inqueſt, *The ſame Juſtices of the Peace in the County Seſſions, might fine the Jury of the former Inqueſt.* By which may be obſerved, That *the ſaid clauſe of the ſaid Act of* 3 H. 7. *doth fully and clearly prove, that by the common Law, Juries were not finable concerning their Preſentments, Indictments and Verdicts.* And even that Clauſe, ſince that time, being One hundred, Ninety and four Years, or thereabouts, hath ſeldom or never been uſed. Our Books of Reports

of Law-Cases not affording any plain or full Instance of any Proceeding on that Clause of that Statute. Therefore it may seem, as *Littleton* saith in his Book, *Sect.* 108. *That in as much as it was never seen or heard, that any Action was brought on the Statute of* Merton (*which was made* 20 H. 3.) *For the matter he treats of in that Section, no Action could be brought thereon. For if any Action might have been brought for that matter, it shall be intended, that it would some time or other have been put in ure.* And with this agrees the Ld. *Coke*, in his Comment on that place. And also the Judges, in their Arguments on a late case of Action brought on the Statute, about the Return of Members of Parliament, did cite the said place of *Littleton*. By which appears concerning such unusual manner of final Juries by the Clause of 3 *H.* 7. how there ought to be great Caution, in Executing any Acts or Statutes, where they alter the Common Law and Course thereof; seeing that Act of 3 *H.* 7. in that particular, and other memorable things therein, made then such Alterations of the Common Law of this Realm, as I forbear any further here to mention.

FINIS.

This Book not
Time before 29. Dec. 16
as appears by Sergeant
Maynard's Letter to
the Author.